Supreme Court Docket No: 122457

STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal From The Michigan Court of Appeals (Docket No. 227392) Whitbeck, C.J., Fitzgerald and Markey, JJ.

LINDA M. GILBERT,

Plaintiff-Appellee,

vs.

DAIMLER CHRYSLER CORPORATION,

Defendant-Appellant.

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

PROOF OF SERVICE

* * * **ORAL ARGUMENT REQUESTED** * * *

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases — Page(s)

Cases — Page(s)

Cases | Page(s)

STATUTES, COURT RULES AND OTHER AUTHORITIES

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DOES THE EVIDENCE SUPPORT THE JURY'S FINDING THAT PLAINTIFF WAS SUBJECTED TO SEXUAL HARASSMENT IN VIOLATION OF THE ELLIOTT-LARSEN CIVIL RIGHTS ACT, AND DID THE COURT OF APPEALS CORRECTLY AFFIRM DENIAL OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT?

Plaintiff-Appellee answers "YES".

A. DID THE COURT OF APPEALS CORRECTLY RECOGNIZE THAT, IN REVIEWING A DISPOSITIVE MOTION, THE EVIDENCE AND REASONABLE INFERENCES ARE VIEWED FAVORABLY TO THE NON-MOVANT?

Plaintiff-Appellee answers "YES".

B. ARE THE ELEMENTS OF RECOVERY NOT IN DISPUTE AND WERE PROPERLY IDENTIFIED BY THE COURT OF APPEALS?

Plaintiff-Appellee answers "YES".

C. DOES THE EVIDENCE, VIEWED FAVORABLY TO PLAINTIFF, ESTABLISH A CAUSE OF ACTION UNDER THE ELLIOTT-LARSEN ACT?

Plaintiff-Appellee answers "YES".

II. DID THE COURT OF APPEALS CORRECTLY FIND THAT THE TRIAL COURT DID NOT ABUSE HIS DISCRETION IN HIS PROCEDURAL RULINGS?

Plaintiff-Appellee answers "YES".

A. DID THE COURT ABUSE HIS DISCRETION IN CONCLUDING THAT DEFENDANT WAS NOT DENIED A FAIR TRIAL BY THE CLOSING ARGUMENTS OF PLAINTIFF'S COUNSEL, WHERE THE COURT RESPONDED APPROPRIATELY TO DEFENDANT'S SINGLE OBJECTION?

Plaintiff-Appellee answers "NO".

B. DID THE TRIAL COURT ABUSE HIS DISCRETION IN EVIDENTIARY RULINGS?

Plaintiff-Appellee answers "NO".

III. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE TRIAL JUDGE COMMITTED NO ABUSE OF DISCRETION IN DENYING DEFENDANT'S MOTION FOR REMITTITUR?

Plaintiff-Appellee answers "YES".

A. IS ANY ISSUE REGARDING PUNITIVE DAMAGES PRESENTED OR PRESERVED FOR SUPREME COURT REVIEW?

Plaintiff-Appellee answers "NO".

B. IS A REMITTITUR MOTION CHALLENGING NON-ECONOMIC DAMAGES IN A CASE ARISING UNDER THE ELLIOTT-LARSEN CIVIL RIGHTS ACT ADDRESSED TO THE DISCRETION OF THE TRIAL COURT; DOES IT LOOK TO THE EVIDENCE; AND SHOULD THE COURT REJECT THE INVITATION TO JUDICIALLY CREATE DAMAGE LIMITATIONS THAT THE LEGISLATURE DID NOT IMPOSE IN THE ELLIOTT-LARSEN ACT?

Plaintiff-Appellee answers "YES".

COUNTER-STATEMENT OF FACTS

The judgment n.o.v. (Issue I) and damage questions (Issue III) entail viewing the facts and all reasonable inferences favorably to the non-movant Plaintiff. While Defendant Daimler Chrysler (also referred to as "Defendant" or "Chrysler") claims to present the facts in that light (Brief, p. 4), it does not do so. It frequently imposes a dismissive "spin"[1] or fails to note relevant facts altogether.[2]

(1) Introduction

Linda Gilbert ("Plaintiff" "Linda" or "Ms. Gilbert") was the first, and for years only, millwright at Chrysler's plant on Jefferson Avenue in Detroit (Tr. 7/6, 50).[3] She had suffered from depression and alcoholism, but was obtaining treatment from Mr. Hnat when she began, and initially looked forward to her job with eager anticipation (*Id*, 42-43, 57-59). Over the next seven years, from her very first day (Tr. 7/7 a.m., 44), up to the day of trial (*Id*, 12), Plaintiff was subjected to an incessant deluge of abuse by which Chrysler's male workers at the plant made it

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[1]For example, Defendant claims that a supervisor told Ms. Gilbert to "clean out her f***ing ears" (Brief, p. 10). The supervisor did not use delicate asterisks; he told her to clean out her "fucking ears". Defendant claims that Ms. Gilbert was called a "c**t" at the job (Brief, p. 11). In fact, she was called a "cunt" . Defendant's work conditions were so sexually offensive that its own counsel cannot bring herself to use the words Linda Gilbert faced. While recognizing the offensiveness of the language used, like the Court of Appeals [Opinion, p. 2, fn. 2; 59a], this Brief will not sanitize the details of what Linda Gilbert was subjected to.

[2]In the volumes of Appendix, almost 1500 pages in full, much of which it did not even offer at trial [see *e.g.* 190a - 253a], Defendant fails to provide some trial exhibits which were part of the work environment Chrysler maintained (see 1b, 3b, 6b, 8b, 11b).

[3]The case was tried for over one month in June and Jule of 1999. Transcript designations refer to the day in 1999 of referenced trial proceedings and, where applicable, the morning or afternoon session. Thus, the reference "Tr. 7/6 p.m., 50" identifies page 50 of the transcript reporting proceedings held on the afternoon of July 6, 1999.

clear that "they were going to keep trying and keep trying and keep trying to get me out of there" (*Id*, 70-71).

The abuse was open and obvious to management (Tr. 7/6 p.m., 83). Plaintiff reported numerous incidents directly to her supervisors, union officials, labor relations personnel, and even to Chrysler's own labor counsel who conducted an "investigation" in which Plaintiff related several incidents under oath[4] (Tr. 7/6 p.m. , 48, 52, 56, 66, 69, 74-75, 80; Tr. 7/7 a.m., 14-15). Supervisors themselves participated in the stream of obscenities (Tr. 7/6 p.m., 76; Tr. 7/17 a.m., 14-15; Tr. 7/7 p.m., 87). For all that was done to Plaintiff, Defendant never as much as suspended any perpetrator for one minute.

Plaintiff attempted to obtain peace of mind without litigation, telling her supervisor that if Chrysler continued to do nothing she would have to go further (Tr. 7/6 p.m., 66). "[N]othing happened, and that is why I filed this lawsuit" (*Id*).

The case was tried in Wayne County Circuit Court before a jury, Hon. John Murphy presiding. After six weeks of trial, the jury returned a verdict for Plaintiff. The customary post-trial motions were filed. After considering and discussing the issues at length, Judge Murphy denied them in an exhaustive Opinion (8a - 57a). The Court of Appeals (Chief Justice Whitbeck, Judges Markey and Fitzgerald) did the same (58a - 95a). Having failed to persuade any jury, trial judge, or Court of Appeals Judge, Defendant asks this Court so spare it from the civil consequences of the Elliott-Larsen violations found by the jury and upheld by the lower courts.

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[4]On November 3, 1994, and again on January 14, 1997, Plaintiff gave deposition testimony to Chrysler's in-house counsel. The transcripts of that testimony were admitted at trial. These were shown by Chrysler's attorneys to one or more of Ms. Gilbert's supervisors (Tr. 7/7 a.m., 25). While Defendant now claims that the deposition testimony may not be regarded as notice, at trial Chrysler claimed, and the trial judge agreed, that the depositions were part of the employer's "investigation" (Tr. 7/7 a.m., 39-42).

(2) Overview of the Sexual Harassment

The misconduct occurred on a daily basis. Ms. Gilbert testified that it was "constant" (Tr. 7/6 p.m., 46), "it was very hard to deal with every day" (*Id*, 85), ". . . they continued to do it on a daily basis . . ." (Tr. 7/7 a.m., 4), "it was an every day thing" (Tr. 7/7 a.m., 23), "On a daily basis it seemed like there was always something that happened" (*Id*, 3). As a result, Plaintiff could not remember every incident or detail (Tr. 7/6 p.m., 50, 64, 80; Tr. 7/7 a.m., 32).

Similarly, she was unable to recount every time a specific Chrysler manager knew of the abuse. However, she realized that her complaints were not stopping the harassment, and were perhaps accelerating it. When she notified management, "the guys laughed about it, they thought it was a big joke" (Tr. 7/6 p.m., 45). The response at Chrysler, "The more I reported things, the more hassle I got" (*Id*, 46). She attempted to portray toughness, thinking that if her tormentors knew how much they were hurting her, they would become even more brazen (Tr. 7/7 p.m., 5). Even so, another employee confirmed that she wept openly over 100 times (Tr. 6/30 p.m., 23).

Chrysler's supervisory personnel participated in the misconduct and advised Ms. Gilbert to keep quiet. She was called "cunt", "whore", "fucking cunt", "bitch", "drunk ass", and "pussy" (Tr. 7/6 p.m., 47; Tr. 7/7 a.m., 23, 50, 54-60; Tr. 7/7 p.m., 87). When she received a ride to work, it was rumored that she performed fellatio as payment (Tr. 7/6 p.m., 51). Supervisors made no effort to prevent the vulgar comments (*Id*, 63). Instead, they told her to "take a shower and clean out your fucking ears" (*Id*, 76), talked about "cunt [hair]" (Tr. 7/7 a.m., 14-15), called her a "bitch" (Tr. 7/7 p.m., 87), and insisted that she "act like it doesn't bother you" (Tr. 7/6 p.m., 57).

The abuse varied from day to day, "Some days were worse than other days. Some days it was just small things. Other days it was more serious" (Tr. 7/6 p.m., 43-44). The uncertainty wrought havoc with her emotional stability and made the very prospect of going to work - - which

she did seven days a week (Tr. 7/7 a.m., 7) - - a terrifying experience. As she explained, "I dreaded going to work because I never knew what I was going to run into when I got there" (Tr. 7/6 p.m., 43-44); she hated going to work because she didn't know what would happen (*Id*, p. 52; Tr. 7/7 a.m., 4).

The cascade of indignities made Plaintiff feel "isolated" and "belittled" (Tr. 7/6 p.m., 47-48), and "estranged" (Tr. 7/7 a.m., 6). A "cartoon" to the effect that women should be barefoot and pregnant and one which depicted her about to suck the penis of a co-worker, "made me feel, like, that is the only thing a woman is good for" (Tr. 7/6 p.m., 63-65). Vulgar materials left in her locker, "Where I changed my clothes" were such that "I just felt invaded" (*Id*, 73).

A number of supervisors saw the harassment (Tr. 7/7 p.m., 84). In some instances, Plaintiff provided the names of those who harassed her, but the only "discipline" was a warning to a Chrysler worker who repeatedly referred to his "big piece of meat" (Tr. 7/6 p.m., 77-78, 85; Tr. 7/7 a.m., 13-15). She testified, without objection, that "there were quite a few people in management and in the union and my fellow tradesman that knew who was doing this" (Tr. 7/6 p.m., 82). Defendant did nothing (Tr. 7/6 p.m., 66, 69, 70, 80, 81, 85). The company's inaction "made me feel like these guys can do this kind of stuff and nothing is going to happen" (Tr. 7/7 a.m., 66), reminding her of the sexual abuse she suffered as a child (Tr. 7/7 a.m., 18-19).

As the working conditions deteriorated, so did Ms. Gilbert's mental health. She had problems sleeping and eating, as well as stomach problems and headaches (Tr. 7/7 a.m., 10). She resumed her self-destructive drinking and was hospitalized several times for alcoholism or depression , "For me, to drink is so that I don't have to feel" (Tr. 7/7 p.m., 60).

When alcohol was unable to sufficiently anesthetize her, Plaintiff attempted suicide for the first time in her life (Tr. 7/7 a.m., 7). She felt that she had no options and that, by killing herself, "It would be over with, the pain would be gone" (*Id*, 9).

Through this all, she refused to placate her tormentors by quitting. She remained because, "I wasn't going to let them run me out", "I had every right to be there" (Tr. 7/6 p.m., 52). As of the time of trial, she still wanted to live, "I want to live because I think that I am here for a reason, and I haven't found out what that is yet. Otherwise, God wouldn't have kept me here this long" (Tr. 7/7 a.m., 11).

(3) Some of the Specific Instances

While the trial could not capture every incident, several were recounted with specificity. Excerpts from the Court of Appeals Opinion, with a few additional comments, will provide some flavor of the conditions Chrysler maintained.

a. Wolf Whistles/"Bitch"

In March of 1992, Plaintiff attended class at Macomb College to receive training for her new job. One millwright referred to her as a "bitch" and a man seated behind her commented that he hoped she would wear a dress to work, and hooted about the view he would have as he held a ladder for her. The tone of her life for the next five years had been set (Gilbert dep. 9; Tr. 7/7 a.m., 44).[5] The perpetrator was identified as a millwright seated behind her, one of the 4 or 5 people, but Chrysler took no action (Tr. 7/7 a.m., 44-48) (Opinion; 59a).

b. The "Fucking Cunt"

In her first year, Ms. Gilbert was playing cards with co-workers when Ed Davies looked over her shoulder and told her to throw in her hand, that she had already lost. She told him that he wasn't playing and should leave her alone. He responded by calling her a "fucking cunt" in front of her male co-workers (Gilbert dep. 13-14; Tr. 7/7 a.m., 50-51). Chrysler did not discipline Mr. Davies.

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[5]The reference to "Gilbert dep" refers to the November 3, 1994 deposition admitted at trial (1321a - 1440a).

c. Show Us Your Muscles

On several occasions early in her employment, Linda would arrive at work to find access to her tool box blocked by large wooden pallets, or oil drums, which she believed were intentionally placed there by the men to upset her, and prevent her from doing her job (Gilbert dep. 15; Tr. 7/7 a.m., 52-53). She reported this to her supervisor, but no investigation or discipline took place (Opinion, 3; 60a).

d. Get Out Of Our Way

Once, Plaintiff needed a welding torch from the "crash wagon" which was used by Jack Nigoshin and Jerry Ernat, the other millwrights on her shift, who considered it their personal property. When she called for the cart, Ernat brought it to where Linda was working and proceeded to take over the job. When Linda told Ernat that she didn't need his help, only the torch, he called her a "bitch" and an "asshole" in front of several co-workers, including Joe Christman, the supervisor. Christman stepped in between Ms. Gilbert and Ernat in an attempt to stop the confrontation, which was witnessed by numerous other workers in the area (Gilbert dep. 19-20; Tr. 7/7 a.m., 58). Despite this observation by a supervisor, Chrysler did nothing.

e. Squealing

When Linda didn't back down, the men raised the bar. Nigoshin and Ernat once reported to Harry Pilon, Linda's direct supervisor, that she had been missing for three hours. Pilon knew where she had been all along and told the pair that it was none of their business. This didn't stop them. Next time they went to the Union Steward, Jerry Heikkila, and reported that Plaintiff had been missing for five hours. They were again told that it was none of their business where she was (Gilbert dep. 22-25). Although Pilon, a supervisor, was directly involved, Chrysler did nothing.

f. Male Humor

One day a sexually explicit cartoon was taped to Ms. Gilbert's locker. The word "bitch"

was written on masking tape attached to the cartoon. Dick Castleman, Linda's supervisor, saw the cartoon and instructed Plaintiff to "act like it doesn't bother you." Linda left it taped to her locker for several weeks until someone else eventually took it down (Gilbert dep. 25-26; Tr. 7/7 a.m., 65). Chrysler conducted no investigation, such as analysis of the writing.

g. Sucking The Boys

As the Court of Appeals described the incident (Opinion, pp. 3-4; 60a - 61a):

> "On May 22, 1993, Gilbert went to her tool box to retrieve a grinder, but found that someone had taken it. In searching through her toolbox drawers for the grinder, Gilbert discovered a cartoon entitled 'Pecker Wrestling.' In the cartoon, three men are watching a fourth man, who is sitting on a table with his pants around his ankles. A woman in the cartoon is grasping the seated man's penis, and from the expression on her face, appears to be exerting some effort to 'wrestle' with his penis. A second woman is observing the action. Though difficult to discern from the photocopies in the record, the name 'Linda' is written on the cartoon with an arrow to the woman who is 'wrestling,' the name 'Bill Barr' - - the name of a welder or millwright who worked with Gilbert - - is written across the chest of the man seated on the table. Names of three other millwrights who worked with Gilbert and arrows pointing to the three other men in the cartoon are also visible. There is a question mark over the second woman in the cartoon.
>
> Gilbert reported this incident to her supervisor, Harry Pilon, and in writing to Chrysler management, providing management with a copy of the cartoon. She noted that she thought the cartoon was 'obscene,' citing the names written on the cartoon as names of people with whom she worked. As she saw it, the woman named 'Linda' in the cartoon was 'bare-breasted and about to perform fellatio.' Gilbert stated that she was 'extremely insulted and degraded. The insinuation that this happen[ed] between' her and a man with whom she worked 'everyday' was 'humiliating.' Gilbert did not mention any earlier incidents of sexual harassment in her written report."

Frank Battaglia, a Human Relations employee at Chrysler that its counsel claimed was in charge of investigating the acts perpetrated on Plaintiff (Tr. 6/16 p.m., 51-52), never attempted

to find out exactly who the men were whose names were on the "cartoon" (Tr. 6/21 a.m., 66-69). He never sought handwriting samples (Tr. 6/21 a.m., 69). Plaintiff testified that she had "an idea" who had done it but did not want to say because she wasn't sure and it was a serious matter with serious consequences (Gilbert dep. 33). She was told that the men would all be spoken with and given copies of the company's sexual harassment policy (Gilbert dep. 31). Battaglia testified that he met with a few of the men but then told Christman and Pilon to meet with the rest, and couldn't say if or when that ever occurred (Tr. 6/21 a.m., 13-15). Battaglia could only say that he believed that the men were spoken to in groups and given copies of the sexual harassment policy. He did not personally do this, delegating the task to others (Tr. 6/21 a.m., 11).

h. I'll Show You Mine

Chrysler's response to the "cartoon" was so cursory that, less than two weeks later, a photo was placed by Plaintiff's toolbox.[6] To quote the appellate court (Opinion, 4; 61 a):

> "About a week and a half after finding the wrestling cartoon, June 5, 1993, Gilbert went to her toolbox, only to find that someone had taped a Polaroid photograph of male genitalia to the top of it. She reported this incident to Pilon and Battaglia. Battaglia spoke with Gilbert and Pilon about the Polaroid, but did not separately investigate it, partly because that was not his responsibility and partly because, he later claimed, the investigation into the wrestling cartoon was still underway. Chrysler never determined who had left this cartoon or photograph."

Battaglia admitted that he did not investigate this incident whatsoever (Tr. 6/16, 66). He did not even interview any of Linda's co-workers.

i. Move The Victim

By this time, Plaintiff had no alternative to moving out of the area. Even though she is

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[6]The actual photo was smaller than depicted on Appendix page 3b.

asthmatic, she was transferred to the paint shop (Tr. 7/6 p.m., 74).

j. The Harassment Continues

> "At about this time, more nonverbal incidents began occurring even though she moved from the paint shop back to the core assembly area. For instance, someone left a Penthouse magazine on her toolbox. Another day, Gilbert left her can of diet Pepsi on the table in a break area to respond to a repair call. When she returned, someone had placed a magazine next to her drink to make it look as if she had been reading an article entitled 'Why Men Have So Many Sperm'" (Opinion, p. 5; 62a).[7]

During this same time frame, a piece of hose, cut and shaped to resemble a penis, was left in Ms. Gilbert's area. She threw it way (Tr. 7/7 a.m., 77).

k. The Supervisor: "Clean Out Your Fucking Ears"

One day Ms. Gilbert was talking with Herb Hicks about a job and asked him to repeat what he had said. He replied, "You'd better take a shower and clean out your fucking ears." Several co-workers overheard this. A co-worker once looked for Linda and Hicks had asked him, "Are you looking for that bitch?" (Gilbert dep. 40). Linda went to the union steward, Jerry Heikkila, to complain about Hicks. Heikkila told Linda that he spoke to Hicks and that he was defensive about it, but that he [Heikkila] knew that Hicks knew immediately that he had been out of line (Gilbert dep. 40-41). Defendant has never as much as chided Mr. Hicks for this.

l. Piss On Your Lawsuit

Plaintiff filed suit in March of 1994.

> "That summer, in a separate incident, Gilbert returned to an area that she had blocked from public view to use as a changing area to find that someone had urinated on a chair on which she ordinarily sat to change her boots." (Opinion, p. 5; 62a).

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[7]Plaintiff recalled that these incidents occurred while she was working in the paint shop (Tr. 7/7 a.m., 76-78).

Shortly before her deposition was taken, Plaintiff returned to her locker to find liquid on her chair (Gilbert dep. 58). She called her co-worker, Fred Lemmerz, to come and look at the chair. As Lemmerz got close to the chair he could tell it was urine because of the smell (Tr. 6/30, p.m., 22, 49). He testified that Linda was upset and crying because she couldn't believe someone would do that to her (Tr. 6/30, p.m., 23). Linda got rid of the chair, replacing it with another (Gilbert dep. 58).

M. Dr. Ruth

In September of 1994 Linda found a newspaper clipping taped to the inside of a wooden cabinet where she kept her uniform. The clipping was a Dr. Ruth Westheimer column about a man complaining his penis was sore from having sex too often (6b) (Gilbert dep., 53; Tr. 7/7 a.m., 79-80). As the appellate court described the incident (Opinion, p. 5; 62a):

"Chrysler was aware of this article no later than October 10, 1994."

N. Highway Signs

As her deposition date grew near, Plaintiff received another treat (8b), described by the Court of Appeals (Opinion, p. 6; 63a):

> "On October 10, 1994, Gilbert returned to her locker only to find that it had been pried open and someone had left a cartoon entitled 'Highway Signs You Should Know' in the locker. The cartoon had fourteen 'signs' that used drawings of naked bodies or body parts engaged in sexual activity to illustrate the meaning of each 'sign'. For instance, for 'men at work,' the cartoon showed a man and woman having intercourse. Gilbert reported the cartoon to Pilon and to management. Maya Baker, a human resources employee, spoke with Gilbert. Baker suggested that Gilbert use a designated locker room, which was a relatively long distance from her work area, instead of her makeshift changing room, so she would draw less attention to herself. Baker also spoke to the union stewards on the three shifts and stopped by Gilbert's work area several times before and after she reported to work to see if she would find anyone

leaving the cartoons. Baker wanted to make it known to the workers that Chrysler was investigating Gilbert's allegations and that the person caught harassing Gilbert would be punished. Baker never caught the person who left the cartoon and lost touch with Gilbert because of Chrysler's policy of rotating human resources personnel through different shifts every few months."

o. Defendant's Response To The Information Obtained By November, 1994

The corporate indifference was described by the Court of Appeals (Opinion, p. 6; 63a):

> "In November 1994, Chrysler deposed Gilbert for the first time. In this deposition she detailed the comments and harassment, including some incidents she had not previously reported. Following this deposition, Gilbert indicated, no one from Chrysler approached her or attempted to investigate any of her complaints, though she continued working at the Jefferson North Assembly Plant as a millwright."

p. "Creation of a Pussy"

To again quote the appellate court (Opinion, pp. 6-7; 63a - 64a), regarding the "poetry" allowed at the Chrysler facility (11b):

> "On March 12, 1995, Gilbert discovered an illustrated 'poem' entitled 'The Creation of a Pussy' that had evidently been posted in the carpenter's shop, about twenty yards from the millwrights' shop:
>
> Seven wise men with knowledge so fine,
>
> created a pussy to their design.
>
> First was a butcher, smith with a wit,
>
> using a knive [sic], he gave it a slit.
>
> Second was a carpenter, strong and bold,
>
> with a hammer and chisel, he gave it a hole.

Third was a tailor, tall and thin,

by using red velvet, he lined it within.

Fourth was a hunter, short and stout,

with a piece of fox fur, he lined it without.

Fifth was a fisherman, nasty as hell.

threw in a fish and gave it a smell.

Sixth was a preacher whose name was McGee,

touched it and blessed it and said it could pee.

Last came a sailor, dirty little runt,

he sucked it and fucked it and called it a cunt.

> Running around the border of the 'poem' were caricatures of each of seven 'wise' men posed or brandishing an item that reflected each man's 'skill;' the sailor, for example, was shown having intercourse with a women."

For much of this conduct, Defendant conducted no investigation at all. It warned one employee once; otherwise, it has assessed no discipline whatsoever.

(4) Other Damage Evidence

Plaintiff presented lengthy testimony from Steven Hnat and Dr. Carol Katz regarding Gilbert's physical and medical condition and the effect that the sexual harassment and hostile working environment had on her quality of life and life expectancy. Medical records from numerous facilities where Plaintiff had been treated were presented (*e.g.* 152b - 183b). These records detail the connection between the atmosphere at Plaintiff's workplace, her problems with alcohol and depression, and how the two combined to cause irreparable injury to Linda Gilbert.

Dr. Katz, who had treated Plaintiff in the past, testified that the daily stresses that she endured in her workplace likely consumed Plaintiff, and slowed down any progress she could have made in overcoming her alcoholism and depression (Tr. 7/6 a.m., 84). Dr. Katz testified that Linda Gilbert felt angry about not getting any support in her work environment (Tr. 7/6 a.m., 81).

Mr. Hnat, who had also treated Plaintiff in the past, testified that he was licensed by the State of Michigan to make a psychiatric diagnosis and that part of that process is the diagnosis of particular disorders. He testified that Linda had developed a secondary illness, major depressive disorder, which he believed was a direct result of the abuse she had endured (Tr. 6/23, 34). This disorder was not present when he had treated Plaintiff in 1992. Mr. Hnat also testified that this is a permanent condition that Linda will suffer from for the rest of her life (Tr. 6/23, 34-36). Defendant cross-examined Mr. Hnat for three days, but presented no rebuttal testimony.

(5) Procedural History

Following a six week trial, the jury deliberated for about one and one half days.[8] It returned a special verdict, explicitly finding that Plaintiff suffered sexual harassment in violation of the Elliott-Larsen Act, and that Defendant did not adequately investigate and take prompt and appropriate remedial action (Tr. 7/19, pp. 3-4; 6a). It assessed damages at $20,000,000 for the constellation of past and future damages Ms. Gilbert has suffered and will suffer (*Id*, p. 4), and $1,000,000 for future losses (*Id*).[9]

Through new counsel, Chrysler filed the customary post-trial motions. Plaintiff responded (13b - 105b). The materials included Affidavits from Plaintiff's trial counsel and Mr. Hnat (106b - 122b), as well as materials regarding Mr. Hnat's background (124b - 151b). Judge Murphy, in an exhaustive Opinion (8a - 57a), denied the defense motions.

Defendant then appealed to the Michigan Court of Appeals. The panel of Chief Judge Whitbeck, Markey and Judge Fitzgerald was unanimous. In a lengthy Opinion (58a - 95a), the Court affirmed the verdict and Judgment.

Defendant then enlisted the Amicus assistance of the Michigan Chamber of Commerce and United States Chamber of Commerce. With their filing, this Court granted Daimler Chrysler's Application for Leave to Appeal. This Brief responds to the argument of Defendant, the Chamber Amici, and the Michigan Municipal League Liability & Property Pool ("MML Liability").

SUMMARY OF ARGUMENT

While Chrysler decries the size of the verdict, the truly extraordinary feature of this case is the gravity of the misconduct which demanded commensurate retribution. The record reveals a workplace that was a cesspool of virulent misogyny, which festered to unprecedented dimensions, encouraged by corporate indifference. The sheer frequency of the harassment - - day in, day out for years - - is unparalleled in the legal literature. The crudeness of the sexually oriented materials which Chrysler employees used in their effort to drive Plaintiff from the workplace is striking. The toll taken on Linda Gilbert, in her simple quest to pursue a rewarding career with her dignity intact, is monumental. Through all this, Defendant made virtually no effort to investigate, and made no effort at all to discipline, those of its employees who created a toxic Chrysler work environment on its premises.

Under settled principles of review, the evidence is sufficient, indeed, overwhelming, to support the jury's finding of an Elliott-Larsen violation. Surely the Michigan Legislature sought to, and did, forbid sexual harassment of the type inflicted on Linda Gilbert. This Court should not eviscerate the Elliott-Larsen statute by embracing Daimler Chrysler's contention that the Act regards the conduct established at trial as a permissible work environment for Michigan women (Issue I, *infra*).

In the trial court, Daimler Chrysler adopted the strategy of a "low key" defense. The case was defended by in-house employees of Defendant. The Joint and Final Pre-Trial Order reflected that Plaintiff would call Steve Hnat as an expert witness (108a), but Chrysler chose not to depose him, and indicated that it would not call any expert witnesses (109a - 110a). In most instances, the evidence was admitted without objection, and Defendant had but one objection to Plaintiff's closing argument.

In large part, Defendant's post-trial complaints about the trial procedure are at odds with its trial posture and are not preserved for appeal. In all events, the trial court did not abuse his discretion in evidentiary rulings, in rulings on the objection to Plaintiff's closing argument, or in deciding the motion for new trial. The Court of Appeals applied the correct standard of review and properly affirmed (Issue II).

The Michigan Constitution and Elliott-Larsen Act make the jurors the persons to quantify non-economic damages. The Court should decline to adopt a judge-made damage limitation which the Legislature opted not to impose, and should decline to take on the damage-assessment role to Defendant's benefit. The appropriate standard does not limit awards to verdicts in difference cases. Here, the evidence supports the jury's award of non-economic damages, an award which places a high value on human dignity. The Court should not elevate dollar bills over human dignity (Issue III).

I. THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT PLAINTIFF WAS SUBJECTED TO SEXUAL HARASSMENT IN VIOLATION OF THE ELLIOTT-LARSEN CIVIL RIGHTS ACT, AND THE COURT OF APPEALS CORRECTLY AFFIRMED DENIAL OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

A properly instructed jury[10] found that Linda Gilbert was subjected to sexual harassment in violation of the Michigan Civil Rights Act (6a). The trial judge found ample evidence to support the verdict (34a - 51a). The Court of Appeals reached the same conclusion (69a - 78a). Resigning the standard of review to a footnote [Brief, p. 23, fn. 12], Chrysler and the U.S. Chamber ask this Court to decree that Michigan's Elliott-Larsen Civil Rights Act sanctions the abuse which Linda Gilbert endured. They call upon this Court to disagree with every juror and Judge that has considered the case. This Court should reject that argument and reaffirm the protections to working women in Michigan that the Legislature provided when it enacted the Elliott-Larsen statute.

A. THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT, IN REVIEWING A DISPOSITIVE MOTION, THE EVIDENCE AND REASONABLE INFERENCES ARE VIEWED FAVORABLY TO THE NON-MOVANT.

The unstated premise of Chrysler's argument is that this Court may usurp to itself the fact-finding role which Michigan's Constitution reposes in the jury [Art. I, § 14]. The Court of Appeals correctly recognized the controlling standard of review (Opinion, p. 13; 70a):

> "In the end, whether the trial court erred in denying Chrysler's

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[10]Defendant has never raised any claim of instructional error in the trial court, Court of Appeals, or even in its Application to this Court.

> motion for JNOV depends on whether there was a question of fact concerning which 'reasonable jurors could have honestly reached different conclusions,' making the jury the proper arbiter of the facts. When reviewing the evidence to determine whether there was a factual dispute for the jury to settle, 'this Court must view the testimony and all legitimate inferences which may be drawn therefrom in a light most favorable to the nonmoving party."

The jnov motion called upon the trial court, and in turn the Court of Appeals and this Court, to apply settled dispositive motion principles. The evidence, and all reasonable inferences, must be viewed in a light favorable to the non-movant Plaintiff. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993); *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986); *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998).[11]

B. THE ELEMENTS OF RECOVERY ARE NOT IN DISPUTE, AND WERE PROPERLY IDENTIFIED BY THE COURT OF APPEALS.

The Elliott-Larsen Civil Rights Act provides:

> "The opportunity to obtain employment. . . without discrimination because of religion, race, color, national origin, age, sex, height, weight or marital status as prohibited by this act, is recognized and declared to be a civil right." [MCLA 37.2102(1)].

The compelling policy which motivated the Legislature to pass the Elliott-Larsen Act was described in *Miller v CA Muer Corp*, 420 Mich 355, 362-363; 362 NW2d 650 (1984):

> "Civil rights acts seek to prevent discrimination against a person because of stereotyped impressions about the characteristics of a class

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[11] With few exceptions, the liability evidence was admitted without objection. To the extent Defendant seeks to challenge evidence admitted without objection, its argument comes too late. MRE 103(a)(1); *Reetz v Riggs*, 367 Mich 35, 41; 116 NW2d 323 (1962). Defendant's sufficiency of the evidence argument looks to the adequacy of the evidence admitted, without regard to unpreserved questions of whether an evidentiary objection, if made, would have been successful.

> to which the person belongs. The Michigan civil right act is aimed at 'the prejudices and biases' borne against persons because of their membership in a certain class, *Boscaglia v Michigan Bell Telephone Co*, 420 Mich 308, 316; 362 NW2d 642 (1984); *Freeman v Kelvinator, Inc*, 469 F Supp 999, 1000 (ED Mich, 1979), and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." (Footnote omitted).

Accord: *Radtke*, 442 Mich at 379; *Noecker v Corrections Dept*, 203 Mich App 43, 46; 512 NW2d 44 (1993); *Bryant v Automatic Data*, 151 Mich App 424, 430; 390 NW2d 732 (1986).

The statute is broad enough to address the wide variety of discriminatory practices in which employers may engage. At its core, it allows women to pursue their career goals, even in traditionally male-oriented fields of employment, without being abused or harassed. There is, and can be, no doubt that an employer that subjects a woman like Linda Gilbert to a hostile work environment has violated the civil rights laws of Michigan. MCLA 37.2103(h); *Radtke*, 442 Mich 380[12]; *Chambers v Trettco, Inc*, 463 Mich 297, 309-311; 614 NW2d 910 (2000).

Indisputably, Plaintiff "belonged to a protected class". The "communication or conduct" to which Ms. Gilbert was subjected was "on the basis of [her] sex". This included "unwelcome sexual conduct or communication." Thus, the elements here in dispute are whether the

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[12]In *Radtke*, the Court quoted the Legislative Analysis (442 Mich at 380-381, fn. 15):

> "Individuals who are sexually harassed suffer psychologically, physically, and economically. Organizations which allow such activities suffer reduced worker safety and efficiency, costly job turnover, and increased medical, psychological and sick leave costs. Society pays a price for sexual harassment, since this behavior results in the creation of a female job ghetto in which a large segment of the work force remains transient or abused in the job market."
>
> ***
>
> "Sexual harassment . . . should be outlawed because it violates basic human rights of privacy, freedom, sexual integrity and personal security."

"unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment" and "*respondeat superior*," *Radtke*, 442 Mich at 382-383; *Chambers*, 463 Mich at 311.

C. THE EVIDENCE, VIEWED FAVORABLY TO PLAINTIFF, ESTABLISHES A CAUSE OF ACTION UNDER THE ELLIOTT-LARSEN ACT.

Chrysler argues that no reasonable juror could find that this was a "hostile environment" because the events were benign (Brief, pp. 39-42); that jurors were impelled to find that it was clueless that sexual harassment may have been occurring (Brief, pp. 23-35); and that jurors could only find that Chrysler's response was prompt and adequate (Brief, pp. 35-39). Defendant and the U.S. Chamber invite this Court to deny Plaintiff recovery because, they argue, she was at fault for the continuation of the abuse because she breached some supposed duty, found nowhere in the statutory language, to do more. None of these contentions have any merit.

(1) Reasonable Jurors Could Find That It Is A "Hostile or Offensive Work Environment" In Which The Only Female Millwright Is Made To Endure:

- **Being Confronted with a "Cartoon" Depicting Her Prepared to Suck the Penises of Male Co-workers;**
- **A Polaroid Photograph of Male Genitalia;**
- **A Dr. Ruth Article Entitled "Ten Times a Day is Too Many";**
- **Having Her Chair Urinated On;**
- **Being Told, "I Can't Wait to See You Wear a Dress and I Will Hold the Ladder"**
- **Repeatedly Being Called a "FUCKING CUNT" and "BITCH";**
- **Having a Sign with the Word "BITCH" Attached to Her Work Area;**
- **Having a Penthouse Magazine Left Lying on Her .**

Tool Box;,

- Being Confronted with a Magazine Open to the Article "Why Men Have So Many Sperm";
- Being Told To "Clean Your Fucking Ears Out";
- Confronting a Vulgar "Highway Signs You Should Know" "Cartoon";
- Being Faced With a Vulgar Poem About Female Genitalia on a Bulletin Board;
- Being Told By a Co-Worker Repeatedly About His "Big Piece of Meat";

AND OTHER CONSTANT HARASSMENT ON A DAILY BASIS, WHERE DEFENDANT'S EMPLOYEES ADMITTED AT TRIAL THAT PLAINTIFF WAS SUBJECTED TO SEXUAL HARASSMENT

Daimler Chrysler has contended that what Plaintiff was required to endure was not harassment.[13] The corporate position that this was not a "hostile work environment" goes far toward explaining why the events were allowed to continue unabated. If, as Defendant believes, it is perfectly acceptable to depict a woman performing fellatio on a co-worker, or to force her to view a photograph of a penis, or to have her chair urinated on - - if the corporate position is that this does not cross the "hostile work environment" line - - it is no wonder that the conduct continues. The jury was not required to accept Defendant's view that the Elliott-Larsen Act permits women to be confronted with the indignities heaped upon Plaintiff.

The legal standard looks to the "reasonableness" of the workplace conduct, and whether a "reasonable person" would find the conduct offensive. *Radtke*, 442 Mich at 386-388. That standard, "reasonableness," is one uniquely suited to the collective jury assessment of how

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[13]Amicus U.S Chamber presents an argument which is not offered by any party: that a few of the incidents were not "of a sexual nature", thus Chrysler should receive a new trial (Brief, 24). Defendant did not seek to exclude evidence on this ground at trial. Nor did it object to the instructions on this basis. It did not even make any such complaint to the trial judge in post-trial filings, or to the Court of Appeals, or even in its Application for Leave to this Court. There is nothing remotely resembling a preserved issue to be reviewed on the merits. ·

"reasonable" people conduct themselves. *Moning v Alfono*, 400 Mich 425, 436; 254 NW2d 759 (1977); *Miller v Miller*, 373 Mich 519, 525; 129 NW2d 885 (1964).

Federal courts have recognized that the repeated use of epithets may create an actionable hostile work environment. *Burns v McGregor Electronic Industries, Inc*, 989 F2d 959, 964-965 (8th Cir, 1993) (calling plaintiff names, including "bitch" and "cunt"); *Boutros v Canton Regional Transit Authority*, 997 F2d 198 (6th Cir, 1993) (ethnically hostile work environment where plaintiff was called a "camel jockey" and "camel rider"). As the *Burns* Court observed:

> "Vulgar and offensive epithets such as these are 'widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from the disgust and violence they express phonetically. *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (quoting C. Miller & K. Swift, *Words and Women* 109 (1977); *see also Andrews v. City of Philadelphia,* 895 F.2d 1469, 1485 (3d Cir. 1990) (holding that 'pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment'); *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991) (same); *but see Rabidue v. Osceola Refining Co.,* 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987). The EEOC agrees that a 'workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant.' EEOC Compliance Manual (CCH) § 614. ¶ 3114(C)(1), at 3274 (1990)."

Plaintiff was subjected to a barrage of the same vulgar, offensive, and degrading epithets deemed to create a hostile work environment in *Burns*. There is no legal support for Daimler Chrysler's position that it may permissibly subject a female employee to being repeatedly called a "cunt", "bitch", "whore", or "asshole".

Nor do the authorities support Defendant's suggestion that the Elliott-Larsen Act allows women to be faced with a "cartoon" depicting them as prepared to perform fellatio on a co-worker.

Or, to have thrust upon them a Penthouse fold-out, or a picture of a human phallus, or sexually oriented magazine articles. To repeat, as *Burns* and the *EEOC* Manual note, a "workplace in which . . . displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment".

While Defendant may regard it as permissible amusement to saturate a woman's chair with urine, reasonable jurors may disagree. While Chrysler believes that Michigan law allows the workplace to be filled with obscene photographs and cartoons, jurors may have a different view. Any of the numerous incidents of harassment, standing alone, would be sufficient.

The pattern of incessant harassment in this case far exceeds that of *Downey v Charlevoix Road Commissioners*, 227 Mich App 621, 630-631; 576 NW2d 712 (1998), where older workers were called "old guys" and subjected to conditions which made it more difficulty to do their job. The Court of Appeals had no difficulty in finding that these facts established a jury-submissible case of age-based hostile work environment.

Additionally, unlike Daimler Chrysler itself, a few of its employees at least had the decency to recognize by the time of trial that what occurred was intolerable. For example, without objection, Mr. Pilon conceded that what occurred was sexual harassment (Tr. 6/21 p.m., 23, 38-39). These party admissions [see MRE 801(d)(2)], like a confession in a criminal case, constitute evidence which supports the verdict.

At bottom, Defendant's approach treats countless incidents - - many of them extraordinarily shocking even in isolation - - as unrelated and trivial events. In truth, the vexation was endless; virtually a daily event, day in, day out, over seven years. As the vexation continued, the impact grew geometrically. The synergistic effect of ongoing acts of discrimination is what makes the misconduct unprecedented.

The properly-instructed jurors who devoted weeks of their lives to public service rationally

concluded that what was inflicted on Plaintiff was a "hostile work environment." The trial court, who watched the trial unfold, shared this assessment. The Court of Appeals had no hesitance in rejecting Defendant's contention that the Elliott-Larsen Civil Rights Act allows the workplace conduct which it permitted. This Court should decline the invitation to hold that the Elliott-Larsen Act allows Michigan's working women to be forced to endure these conditions.

(2) The Facts Support The Jury's Conclusion That The Conduct Which Its Employees Undertook At Its Workplace Is Legally Attributable To The Employer.

In addition to praising its work environment, Chrysler claims that it was clueless about what was going on, and that it took prompt and appropriate remedial action. The jury found otherwise. The evidence supports its finding.

Where it is the "employer" that is accused of sexual harassment, it is responsible without regard to principles of *respondeat superior*. *Radtke,* 442 Mich at 397; *Downey*, *supra*. The Elliott-Larsen Act expressly defines "employer" as including the employer's agents, MCLA 37.2201(a); *Chambers*, 463 Mich at 310. Thus, the Act embraces "common-law agency principles", *Chambers,* 463 Mich at 311. Under these principles, a corporate employer is accountable if it "failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment", *Chambers*, 463 Mich at 313.

(a) Under The Principles of *Chambers*, Daimler Chrysler Had "Reasonabl[e] . . . Notice Of The Harassment", Hence The Jury Properly Rejected Its "Defense" of Cluelessness.

The "notice" argument of Daimler Chrysler fails to come to grips with its very corporate existence. It was born not from the womb of a sentient human being, but from papers to which

the scrivener added the title "Articles of Incorporation". As a creature of the law, it has no heart, no soul , no conscience of its own. Nor does it possess eyes to see or ears to hear.

Instead, its eyes are those of the people it hires to do its business. Its ears are those of its employees, agents, and representatives. A corporation like Daimler Chrysler knows what is known by the perpetrators of harassment in its employ, by those to whom it is reported, by those who see it with their own eyes, and those who hear it with their own ears. In law, and necessarily so, "notice" to the breathing members of the group *homo sapiens* that do the work of a corporation is "notice" to the corporation itself. *USF&G v Black*, 412 Mich 99, 126; 313 NW2d 77 (1981); *Cudahy Bros Co v Dock & M Corp*, 285 Mich 18, 27; 280 NW2d 93 (1938).

Much of Defendant's argument is a rambling litany of self-pronounced law for which there is no Michigan authority. It attempts to foist the blame for the harassment on Plaintiff, as if it were her obligation to assure a non-hostile workplace, rather than the employer's. Daimler Chrysler essentially posits that Plaintiff forfeited the protection of the Elliott-Larsen Act by waiting to report certain incidents, or by reporting the misconduct in some fashion other than the formal procedure (which was itself demonstrably ineffectual), or by heeding the direction of her supervisor not to complain. It seeks to ignore the evident pattern of ongoing harassment by compartmentalizing a course of conduct into individual acts.

This approach mis-perceives Michigan law. The question is whether the employer was reasonably put on notice of "the harassment" or " the alleged hostile work environment" (*Chambers, supra*). If so, if it knew of a pattern of conduct, it is immaterial whether it knew of every single instance. It is enough that Defendant knew that harassment was occurring, for the knowledge of ongoing harassment is sufficient to trigger the duty to take action to end it.

Nor does "notice" have to take any particular form. As a matter of fundamental agency law, "notice" to a living employee is "notice" to the inanimate corporate employer (*USF&G, supra;*

Cudahy Bros, supra).

"Notice" can take several forms. It may be explicitly provided by the plaintiff (or, for that matter, by anyone else). Certainly if it is known to a supervisor, *e.g.* if a supervisor was personally involved, this is "notice" to the employer. *Eide v Kelsey-Hayes Co*, 154 Mich App 142, 153; 397 NW2d 532 (1986), *reversed in part on other grounds,* 431 Mich 26; 427 NW2d 488 (1988) ("Since her supervisors were involved, as opposed to co-employees, notice to the employer is presumed"). Or, "notice" can be "constructive" - - "if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring", *Chambers*, 463 Mich at 319.

Here, Defendant had overwhelming notice, from a variety of sources, of what was occurring. For example, Gordon Potempa, a supervisor at the plant, told Ms. Gilbert to use a tolerance, "within a cunt hair" (Tr. 6/30 p.m., 16; Tr. 7/7 a.m., 14-15). Another supervisor, Herbert Hicks, spoke of her "fucking ears" (Tr. 7/6, p.m., 74-76). Defendant can scarcely disclaim knowledge of its own supervisors' participation in a stream of sex-based vulgarities.

Plaintiff formally and contemporaneously notified her supervisors of at least six specific incidents, including: the "cartoon" of her preparing to perform oral sex on male co-workers, the "Highway signs" "cartoon", the "Creation of a Pussy" "cartoon", the Dr. Ruth article, and the instance in which a co-worker told her of his "big meat" (Tr. 7/7 a.m., 36-37). This was more than sufficient for Chrysler to know that sexual harassment was occurring.

Moreover, Plaintiff reported that harassment through the initiation of the lawsuit. She expressly informed the company that she was being subjected to a hostile work environment. An employer who cared might have done something about it then. Defendant did not.

At trial, in the jury's presence, defense counsel claimed that the investigation undertaken by Defendant included depositions of Plaintiff (Tr. 7/7 a.m., 41). During this investigation, Plaintiff

also gave specific and sworn information of numerous incidents in two depositions provided directly to lawyers employed by Chrysler knowledgeable about the Elliott-Larsen Act. Chrysler's attorney is its agent. As a matter of law, notice to the agent (attorney) constitutes notice to the principal (Defendant Daimler Chrysler). *Katz v Kowalsky*, 296 Mich 164, 170-171; 295 NW 600 (1941); *Security Trust & Co v Tuller*, 243 Mich 570, 576; 220 NW 795 (1928); *USF&G, supra; Cudahy Bros Co, supra.* Thus, Chrysler had actual acknowledge of the eighteen additional incidents related, including the urination on Plaintiff's chair at about the time of her first deposition. Indeed, it is difficult to conceive of "notice" better designed to elicit a corrective response from an employer that really cares than a sworn recitation of events to an employment attorney who knows of his or her client's Elliott-Larsen responsibilities.

It should be borne in mind that Plaintiff's supervisor wanted her to keep a low profile, suggesting (erroneously) that if she suffered in silence the harassment would stop. To the extent that Plaintiff did not contemporaneously reveal even more of the ongoing abuse, Defendant can hardly complain that she complied with her supervisor's directive.

Moreover, the harassment was frequently public, involving or in front of numerous Daimler Chrysler employees, for example being called a "fucking cunt," "bitch," "asshole," and "whore," and being told to "take a shower and clean out your fucking ears." Plaintiff was reduced to tears at least 100 times, sometimes at the workplace itself (Tr. 6/30 p.m., 23). The mistreatment was ongoing. It was known to everyone in the work area. The sheer frequency and openness of the mistreatment was such that "a reasonable employer would have been aware."

Defendant also obtained, before trial, Plaintiff's medical records. The records recited the ongoing sexual harassment with which Linda Gilbert was faced (see excerpts of medical records found as Appendix 152b - 183b).

Defendant had ample notice, actual and constructive, of the hostile environment in which

Ms. Gilbert was forced to work. The jury was not required to accept Defendant's protestation of corporate cluelessness. Instead, the evidence allowed reasonable jurors to conclude that Defendant's abject failure to take meaningful action was not excused by ignorance. The Court of Appeals correctly concluded, under the principles of *Chambers*, that the evidence was sufficient under the settled standards of dispositive motion jurisprudence.

(b) The Appellate Arguments of Chrysler Do Not Undermine The Sufficiency of The Evidence.

Many of the arguments rejected by the jury, trial court, and appellate court are repeated in this Court. In the main, these are fact-based arguments the persuasiveness of which is for the fact-finder, not a Supreme Court. To the extent Defendant's arguments are regarded as legal, not factual, in nature, they are without merit.

On appeal, Defendant seeks to artificially divide an ongoing course of conduct into discrete incidents, and then to dissect each incident. At trial, virtually every bit of liability evidence was admitted without objection. There was no objection to the liability instructions. Defendant did not seek a special verdict form listing separate acts of harassment. Under these circumstances, the issue is simply whether the evidence supports the jury's verdict. See *Weiss v Hodges*, 223 Mich App 620, 635-636; 567 NW2d 468 (1997); *Phinney v Perlmutter*, 222 Mich App 513, 537-538; 564 NW2d 532 (1997); *Byrne v Schneider's Iron & Metal Co*, 190 Mich App 176, 184; 475 NW2d 854 (1991); *Frohman v City of Detroit*, 181 Mich App 400, 416; 450 NW2d 59 (1989).

It is also fallacious for Daimler Chrysler to argue that the Elliott-Larsen Act imposes actionable duties on individual harassment targets like Plaintiff. The relevant statute proscribes particular actions by an "employer", MCLA 37.2202. Even a managerial employee guilty of harassment is not subject to the Act. *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464;

652 NW2d 503 (2002). As the plain language of the statute imposes obligations on an "employer", this Court must respect that legislative judgment and not concoct "duties" of a harassment victim that the Legislature elected not to enact. See *In re: Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951); *Ford Motor v Unemployment Compensation Commission*, 316 Mich 468, 473; 25 NW2d 586 (1947); *Alexander v Employment Security Commission*, 4 Mich App 378, 383; 144 NW2d 850 (1963).

As the jury was properly instructed, the overall issue is that of "notice" generally. The details and timing of specific complaints may be considered by the jury, but there is no statutory enactment forfeiting protection for failure to complain at a particular time in a particular way. As the Court of Appeals recognized, "notice" entails the "totality of circumstances" [Opinion, p. 19, fn. 36, quoting *Chambers*, 463 Mich at 319].

One need only consider the nature and purpose of "notice" to recognize why this is so. A harassment victim cannot predict when the harassment will next take place or the form it will take. In truth, "notice" is not a specific prediction by the victim of what will next occur. Rather, it is corporate knowledge by which a reasonable employer should realize that future misconduct of a similar nature is likely to occur absent effective protective measures. Thus "notice" notions insulate the employer from liability for the first act of harassment, but permit civil accountability for failing to take effective protective measures after learning of past misconduct by its workforce at its workplace.

The appropriate focus is not on whether the victim predicted the form that future harassment would take; instead, it is on whether **the employer** had reason to anticipate future misconduct. Likewise, the source of the "notice" is not critical; what is important is that it had the notice from some source - - the victim, its other employees, its supervisors, or it own counsel.

It is remarkable that Daimler Chrysler now claims that the specific information given by

Plaintiff, under oath, to an in-house Chrysler attorney specializing in employment law must now be ignored. At trial, Defendant **relied** on that information as demonstrating its own investigatory effort to **acquire** knowledge (Tr. 7/7 a.m., 39-42). A party cannot take one position at trial and the opposite position on appeal. See *Joba Construction v Burns & Roe,* 121 Mich App 615, 629; 329 NW2d 760 (1982).

Indeed, it is difficult to conceive of a **better** person to whom notice should be given. As a matter of law notice to an attorney is notice to the client. *Katz, supra*; *Security Trust Co, supra.* An attorney surely knows better than a lay manager what the Elliott-Larsen Act means and requires. An attorney has access to the legal discovery process to determine what has occurred and by whom. The actual knowledge of Chrysler's attorney does not equal corporate ignorance.

Much the same can be said of the knowledge of Plaintiff's supervisors, the **very** persons to whom she was instructed to report harassment (see Opinion, pp. 19-20). Indeed, supervisors were sometimes the perpetrators, and they surely observed the mistreatment that was an open and daily event.

Neither is there merit to Defendant's reliance on its written "policy". Nothing in the Elliott-Larsen Act limits liability to those foolish enough to adopt discriminatory practices in writing. Nor does the statute provide that one who proclaims in writing that it is "equal opportunity" (wink, wink) is absolved of liability for its actual practices that seek to drive women from the workforce. Here, for example, Defendant's own supervisory employees expressly **discouraged** Ms. Gilbert from reporting the ongoing abuse. Its attempt to demonize her for following supervisory instructions is without merit.

At bottom, there is ample evidence that Defendant had actual and constructive knowledge of the hostile work environment it maintained. Its false claim of ignorance does not entitle it to Supreme Court exoneration.

(c) The Jury Could Permissibly Find That Defendant, Which Failed To Investigate Most Incidents, And Which Would Not Suspend Perpetrators Who Were Identified Even for One Second, Failed To Take Prompt Effective Remedial Action.

Despite overwhelming knowledge, Daimler Chrysler failed to even investigate most of the known incidents. When perpetrators were identified, they were not suspended for so much as one second, and did not lose even one penny in pay. It is scarcely any surprise that the Chrysler employees engaged in misconduct were encouraged to continue their course of conduct unabated.

"[T]he relevant inquiry concerning the adequacy of the employer's remedial action is whether the action reasonably serves to prevent future harassment of the plaintiff", *Chambers*, 463 Mich at 319. The grotesque inadequacy of Chrysler's response is underscored by the fact that it did not "serve to prevent future harassment", but instead encouraged continued misconduct.

Defendant's contention that it was impotent to act because the names of the malefactors were not provided is wholly unpersuasive. Plaintiff **did** provide to Mr. Heikalla, the union representative, the initials of those she was "99% sure" were responsible (Gilbert deposition, 1/14/97, 5). The worker who boasted of his "big meat" was identified by name and reprimanded, but Defendant did not give him so much as a one minute suspension or a one penny fine.[14] The supervisor who referred to "cunt hair" was identified by name, but Daimler Chrysler did nothing. The ongoing vexation inflicted by co-workers Ernat and Nigoshin was open, yet Defendant

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[14]The appropriate employer response to sexual harassment is to immediately fire those responsible. *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 235; 477 NW2d 146 (1991); *Langlois v McDonald's*, 149 Mich App 309, 311; 385 NW2d 778 (1986). Here, Defendant did nothing more than reprimand Mr. Rials, making it clear to all that the employer egarded sexual harassment as trifling.

imposed no discipline at all, even when they were caught lying about Plaintiff in their effort to cause her to lose her job, or when Ernat publicly demeaned her as a "bitch" and "asshole." Defendant knew that its supervisor, Mr. Castleman, had discouraged Plaintiff from formally complaining, yet took no action at all. It also knew that Herb Hicks had joined in the verbal barrage, telling her to "take a shower and clean out your fucking ears," and calling her "bitch," conduct which Plaintiff reported to Mr. Heikkila.

From this evidence, the jury could disbelieve Chrysler's claim that its refusal to discipline Plaintiff's tormentors stemmed from ignorance of their identity. Instead, despite knowing the names of those who were responsible, Defendant did nothing, because it did not take sexual harassment seriously and just did not care about the rights of Linda Gilbert.

This is not to suggest that an employer is free to ignore ongoing sexual harassment whenever the victim is unable to identify the perpetrator. To the contrary, an employer that truly cares will take reasonable steps to find out who is responsible. Otherwise, the specter of anonymity, like a Klansman's hood, emboldens perverts to continue.

Plaintiff did not see who, sitting behind her, expressed the desire to look up her dress. It would scarcely be a feat worthy of Sherlock Holmes to identify the men in the class, or determine who was seated behind her, yet Defendant could not be bothered.

The corporate apathy can also be seen in response to the "cartoon" showing Plaintiff prepared to orally service male co-workers who were identified by name, which was found on May 25, 1993. In the next 10 days, Defendant didn't even talk to several of the possible suspects (Tr. 6/21 a.m., 66-69). Defendant did not even ask those named in the cartoon, or Plaintiff's known antagonists, if they were responsible (Tr. 6/21 a.m., 66-69). Nor did it consult handwriting samples on file - - such as the employment applications - - to identify who wrote the "cartoon" (Tr. 6/21, 69). It is scarcely any wonder that a Daimler Chrysler employee felt free to follow up, on

June 5th, with the Polaroid penis.

The company's response to this second incident is telling. It still conducted no investigation. Instead, its "solution" was to leave the culprits alone, and transfer Plaintiff, the victim, to another area.

Understandably, the vexation only continued. By the time Plaintiff's chair was urinated on (just prior to her deposition), Defendant no longer offered even the pretext of concern. It never made any effort to determine who had urinated on the chair.[15]

Although the institutional Defendant brazenly claimed that it gave the harassment all the attention Plaintiff deserved, its employees were more honest. Mr. Battaglia conceded that the lack of investigation is an inadequate response (Tr. 6/21 a.m., 78).

That is precisely what occurred here. Defendant did not place an undercover person on the plant floor to observe who was responsible. It did not use a camera (as in commonly done to detect drug dealing in a plant) like most gas stations or convenience stores. It did not even question those who were identified. The jury was entitled, indeed compelled, to conclude that Defendant failed to make a prompt, adequate, and effective response to the ongoing harassment.

This is a case where Defendant fostered a hostile environment by its failure to take prompt, effective remedial action after receiving notice that Linda Gilbert was being subjected to sexual harassment. There was ample evidence to support the verdict. This Court should decline the invitation to declare that the Elliott-Larsen Act permits Linda Gilbert, or any other woman in this State, to be forced to endure the degradation shown by the evidence.

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[15]While Defendant faults Plaintiff for not having advised it that the liquid saturating her chair was urine, Mr. Lemmenz could smell the urine that day (Tr. 6/30 p.m., 22, 49).

II. THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT DID NOT ABUSE HIS DISCRETION IN HIS PROCEDURAL RULINGS.

The jury, we are told, was comprised of nincompoops who failed to favor Defendant with a verdict because they were deluded into ignoring weeks of evidence and the instructions of the court.[16] The real culprits, it seems, are an attorney who had the temerity to speak unflattering of Daimler Chrysler in the representation of his client, and a witness who dared to testify about the gravity of the emotional harm inflicted on his patient. The Court of Appeals correctly held that the trial judge did not abuse his discretion.

A. THE COURT DID NOT ABUSE HIS DISCRETION IN CONCLUDING THAT DEFENDANT WAS NOT DENIED A FAIR TRIAL BY THE CLOSING ARGUMENTS OF PLAINTIFF'S COUNSEL, WHERE THE COURT RESPONDED APPROPRIATELY TO DEFENDANT'S SINGLE OBJECTION.

Quoting single words[17] and phrases out of context, Defendant (Brief, pp. 44-

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[16]The thesis offered by MML Liability seems to be that juries do not decide cases based on the evidence, but "crafty attorneys" hoodwink them into verdicts "in contravention of the true merits of the case" (Brief, p. 6). It is true arrogance for an interested entity, like an insurer, that was not at the trial, to believe that it knows an immutable "truth" better than the disinterested citizens who sat as jurors. The circularity of the defense argument, which accepts *ipse dixit* that jury verdicts do not reflect the "true merits", is staggering. With that assumption, a verdict itself "proves" attorney misconduct: (1) jurors don't decide the merits, they are misled by "crafty attorneys"; (2) the jurors returned a verdict for plaintiff; (3) therefore, plaintiff's crafty attorney misled them. By that circular logic, which hinges on the assumption that the commentator knows the "true merits" better than the jury, <u>every</u> verdict is suspect because, by hypothesis, it does not decide the "true merits".

[17]MML Liability castigates Plaintiff's counsel for using the word "imagine" in asking the jury to bring its experience and common sense to bear in attempting to appreciate the gravity of the loss (continued...)

55) and MML Liability (Brief, 5-14) argue that the closing argument of Plaintiff's counsel was so improper as to make a fair trial impossible. At trial, Defendant had a single objection to Plaintiff's closing argument - - asserting that the amount of damages sought (about seven times what the jury eventually awarded) invited a punitive verdict (Tr. 7/15, 98).[18] The court responded to that objection with a second instruction on point[19] (Tr. 7/15, 99), having previously instructed the jury that its verdict was solely to compensate (Tr. 7/15, 25-27),[20] and that the arguments of counsel were not evidence. Defense counsel was content with the responsive instruction, neither criticizing the adequacy of the instruction nor seeking additional relief.

If, as Defendant surmises, the jury was persuaded by Plaintiff's counsel, this only reinforces the truism that punitive damages were not sought. Plaintiff's counsel **himself** made it clear, "You may not punish, you may not harm, you may imply compensate Linda for what she suffered" (Tr.

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[17](...continued)
endured by her (MML Liability Brief, pp. 9-10). The decisions on point rightfully reject efforts by disgruntled litigants to criticize single words or phrases taken out of context.

[18]The argument which precipitated the objection was:

> ". . . [T]o subject anyone to the type of indignity and injustice and intolerable acts that this woman has been subjected to for the past seven years, that figure reflects a symbol, if you will, since you can't adequately compensate her for every - -"

[19] "Members of the jury, with regards to the argument of counsel, that is not to be considered by you as the law that you are to apply in the case, we have already given you the instructions of law as to the proper elements of damages and how you are to compute damages. So, if you heard anything that is in conflict with what the Court told you with regard to that, then disregard what the lawyers say and rely on your memory of the Court's instruction."

[20]The jury verdict form listed the permissible compensable elements of recovery, and the jury's verdict was based expressly on those elements (Tr. 7/19, 4).

7/15, 97).

With that single exception, there was nothing about Plaintiff's closing argument which Defendant's trial counsel thought objectionable. Moreover, it was not until four days later, on July 19th, that the jury returned its verdict.

In its post-trial motion, Defendant began to blame Ms. Gilbert's counsel for the verdict. At it does here, Defendant complained that Plaintiff's counsel mis-characterized the facts and sought a punitive damage award. The trial court was unimpressed, finding that the jury was not diverted from the issues; indeed, that most of the comments were addressed to the issues (Circ. Ct. Op., p. 13; 20a). The hyperbole and rhetoric were based on a tenable view of the evidence, and were no doubt understood as rhetorical by the jury, as well as Defendant's trial counsel, who was on the scene and did not find the comments objectionable (*Id*, 14-15).[21] The court also noted that, while Defendant unilaterally characterized Plaintiff's argument as an appeal for punitive damages, Plaintiff never did seek punitive damages. Morever as the instructions, verdict form, and argument made clear, the verdict was to award compensatory damages only (*Id*, 16-17).

The Court of Appeals likewise found no abuse of discretion, observing that "Not once during the trial did [defense counsel] object to [plaintiff's counsel's] demeanor or his language" (Opinion, p. 22; 79a). The appellate court found no abuse of discretion by the trial court in denying Defendant's motion for a new trial, the first and only complaint about counsel's argument (*Id*, pp. 24, 27; 81a, 84a). That Court recognized, "an attorney's obligation to be a zealous advocate for his client's interests" (Opinion, pp. 24-25), and found that the tenor of closing

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[21]The trial judge stood prepared to intervene upon objection, when counsel made objectively verifiable misstatements of facts, as when defense counsel resorted to this tactic (Tr. 7/15, pp. 134-136, 143-145). Defendant's attorney sought no such intervention, either because she recognized the permissibility of the comments or factual predicate for the remarks, or because of the tactical decision to advantageously accuse Plaintiff of misstating the facts in her own closing argument.

argument constituted permissible advocacy (*Id*, p. 25):

> "As for Fieger's comments during closing arguments, which is when the majority of the passages Chrysler now cites occurred, we conclude that they did not amount of misconduct. Fieger indisputably used vibrant terms to describe the harassment's severity. However, words like 'torture', which means 'extreme anguish of body or mind', and 'abuse,' which means 'to speak insultingly or harshly to or about,' were shocking only because the jury had an evidentiary basis to conclude that they were accurate characterizations of what had occurred. Though Chrysler contends that Fieger suggested to the jury that Gilbert had suffered physical assaults when there was no proof of any physical assaults, the context in which Fieger made those comments does not permit that inference. Rather, as with the other comments, Fieger was emphasizing the unremitting and severe nature of the harassment, not insisting that anyone had physically assaulted Gilbert." (footnotes omitted)

That Court also rejected Defendant's appellate mis-characterization (*Id*, p. 26):

> "Further, Chrysler claims that Fieger was drawing parallels between Nazi atrocities against Jews during the Holocaust with Chrysler as a way to inflame the jury against its new German ownership. In fact, though Fieger suggested that the jury send a message to the Chrysler board room in Stuttgart, he never drew any explicit connection between the Nazis and the German corporation. Rather he referred to the Holocaust survivors who immigrated to Israel as symbolic of Gilbert's strength. We conclude that Chrysler's new corporate identity was never an issue at trial.
>
> Chrysler clearly mounted a vigorous defense. However, Gilbert and the witnesses testifying on her behalf provided an ample evidentiary basis for jurors to conclude, consistent with Fieger's theories and remarks, that Gilbert truly suffered because of the harassment she experienced at Chrysler and that Chrysler's response was either nonexistent or inadequate. The jury just found Gilbert's evidence more convincing than Chrysler's evidence, as was its right." (footnotes omitted).

Its arguments have been found wanting, Defendant desperately resorts to an *ad hominem* attack on Plaintiff's counsel, who is mentioned by name some **80 times.** This diversionary tactic

did not distract the Court of Appeals. Neither should this Court permit itself to be deluded into ignoring the rights of Linda Gilbert.

(1) Decision On A Motion For New Trial Is A Matter For The Trial Court's Discretion.

Daimler Chrysler exhorts the Court to chastize Mr. Fieger, but offers no meaningful discussion of the standard of review. The cases which recognize the controlling standard for a new trial motion - - abuse of discretion - - are legion. They include *Phinney v Perlmutter*, 222 Mich App 513, 538; 564 NW2d 532 (1997); *Anderson v Harry's Surplus*, 117 Mich App 601, 615; 324 NW2d 96 (1982); and *Kailimai v Firestone Tire Co*, 398 Mich 230, 232 (1979).

In *Kailimai* (398 Mich at 233), this Court defined the scope of that deference:

> "The rule . . . to determine if the trial judge has exercised his discretion properly is to the effect that if the reasons assigned by the trial judge for his actions are legally recognized and the reasons are supported by reasonable interpretation of the record, he acted within his discretion."

Unquestionably, "the reasons assigned by the trial judge . . . are legally recognized." Since "the reasons are supported by a reasonable interpretation of the record, he acted within his discretion."

(2) The Trial Court Did Not Abuse His Discretion In Denying Defendant's Post-Trial Motion Which Contended, For the First Time, That Plaintiff's Counsel Had Misstated Facts In Closing Argument.

Defendant complains that Plaintiff's argument included hyperbole or overstatements (Brief,

pp. 44, 51-54; MML Liability Brief, pp. 11-13)[22]. In essence, it urges that the jury was mesmerized into ignoring the evidence by counsel's oratorical denouncement and characterization of the conduct and Defendant's failure to protect Plaintiff from it. Like many parties who differ with their adversary's assessment of their conduct, Defendant claims that Plaintiff's counsel was unfair in his characterization of the facts. The trial court correctly discerned that a disgruntled litigant is not entitled to a new trial just because it does not share the opposing party's view of the case, as the appellate court confirmed.

To be sure, Defendant may have regarded its treatment of Plaintiff as proper and innocuous. It also offered a variety of excuses (dependent on the truthfulness of its employees) why the misconduct continued unabated. But Plaintiff's counsel was not required to accept these excuses as credible. Instead, as the advocate for Plaintiff, he could properly rely on the plaintiff-favorable evidence on disputed issues. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Wheeler v Grand Trunk W R Co*, 161 Mich App 759; 411 NW2d 853 (1984); *Kern v St. Luke's Hospital*, 404 Mich 339, 353-354; 273 NW2d 75 (1978) ("Counsel may...when there is any reasonable basis for it, characterize testimony").

For this reason, a reviewing court will not entangle itself in independently assessing the strength of the inferences urged by counsel. In *Dikeman v Arnold*, 83 Mich 218, 222; 47 NW 13 (1890), the Court recognized the practical considerations which weigh against undoing verdicts for argument that a judge finds unpersuasive:

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[22]While Daimler Chrysler stresses *Badalamenti v Beaumont Hospital*, 237 Mich App 278; 602 NW2d 854 (1999) - - suggesting that since the arguments in that case were deemed improper, consistency requires the same result in this case - - it fails to even mention that Judge Markey was a member of both the *Badalamenti* panel and the panel that decided this case of Linda Gilbert. As her concurrence in both cases reflects, even if counsel crossed the bounds in another case, it does not mean that a new trial is here required.

> "An attorney is entitled to some license in his argument. The testimony to him may bear quite different inferences and conclusions than might be deduced by a disinterested and unbiased judge. But if we were to reverse cases because the attorneys of the parties claimed more from the testimony for their client than we could discern in the evidence, or argued that facts were established when we thought they were not, we should not only invade the province of the jury, but vacate most, if not all, of the judgments that come for review before us."

If Defendant thought that Plaintiff's counsel had overstated the case, it was welcome to object at trial, risking a response that would cite, chapter and verse, the trial evidence supporting the assertion. Instead, Defendant chose to attempt to argue, to its own advantage, the Plaintiff's counsel had exaggerated. It cannot, however, parlay its own tactical decision into a new trial.

There was no danger that the jury could believe that the advocacy of counsel displaced the evidence that had unfolded in the weeks before. The jury was expressly instructed that it was to decide the case on the basis of the evidence, and that the arguments of counsel were not evidence. These instructions have been frequently regarded as curing any supposed error. *People v Bahoda, supra*, 448 Mich at 281; *Nation v W D E Electric Co*, 213 Mich App 694, 696; 540 NW2d 788 (1995); *Conerly v Liptzen*, 41 Mich App 238, 245; 199 NW2d 833 (1972); *Megge v Lumbermens Mutual Casualty Co*, 45 Mich App 119, 124; 206 NW2d 245 (1973); *Kirk v Ford Motor Co*, 147 Mich App 337, 348; 383 NW2d 193 (1985); *Belue v Uniroyal, Inc*, 114 Mich App 589, 596-597; 319 NW2d 369 (1982).

At bottom, Defendant's argument hinges on the notion that the jury ignored the evidence in favor of advocacy. That notion is an insult to the intelligence of those who sacrificed their own lives to fulfill the civic obligation of jury service. It is also at odds with the principle of law that jurors are presumed to have followed the instructions. *Hart v Newton*, 48 Mich 401, 403; 12 NW 508 (1882); *Pettibone v Maclem*, 45 Mich 381, 383; 8 NW 84 (1881); *Aldrich v Drury*, 15 Mich

App 47; 165 NW2d 892 (1968); *Cranson v Eastman*, 28 Mich App 560; 184 NW2d 480 (1970); *Wood v Detroit Edison Co*, 409 Mich 279, 289; 294 NW2d 571 (1980) (Coleman, C.J., concurring); *Stitt v Mahaney*, 403 Mich 711, 718-719, 737; 272 NW2d 526 (1978).

(3) The Trial Court Did Not Abuse Its Discretion In Concluding That Defendant Was Not Denied A Fair Trial By Counsel's Oratorical References To The Importance Of The Civil Rights Law The Jury Was Called Upon To Apply.

Defendant also claims that the jury was persuaded to award punitive damages, despite the instructions and special jury verdict form on point, even though Plaintiff's counsel never requested punitive damages and expressly sought only compensation.[23] The defense approach is based on single words or phrases divorced from their vibrant trial context. That approach is fundamentally flawed. Attorney arguments must be viewed in context. If the thrust of the argument is permissible, there is no place for consideration of semantic niceties, for, "the fact that [counsel] phrased his argument in words not so delicate as an Oxford don might have used does not require reversal". *People v Couch*, 49 Mich App 69, 73; 211 NW2d 250 (1973). If the substance of the argument is permissible, the phraseology used does not justify a new trial. *People v Charles*, 58 Mich App 371, 388; 227 NW2d 348 (1975); *Elliott v A.J. Smith Contracting Co*, 358 Mich 398, 418; 100 NW2d 257 (1960).

In large part, Plaintiff's counsel sought to instill in the jury a sense of the importance of the civil rights statute it was called upon to apply.[24] On point is this Court's observation in *Elliott*, 358

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[23]Defendant's argument is internally fallacious. It assumes that the jury did what Plaintiff's counsel asked. If that is true, it follows that the jury also followed his admonition not to punish, but only to compensate (Tr. 7/15, p. 97).

[24]Defendant stretches matters considerably in trying to depict Plaintiff's closing argument (continued...)

Mich at 420:

> "Appellant's real complaint here is of counsel's skill in gauging the receptivity and response of the jury. Not all juries would respond to an appeal phrased in Biblical terms, and, if overdone, it may be more harmful than helpful. That is the chance counsel must take. It does not, however, constitute reversible error to quote the gospel according to Matthew."

Even if Plaintiff's argument were construed as an expression of hope that the jury would consider the consequences of its verdict[25], this is permissible advocacy. *Elliott, supra* (in an action for the death of a five-year old child struck by a truck, it is not improper to argue that the jury "will make every road safer and every highway safer, if you thunder forth your verdict, 'We find for the plaintiff, and the damages are as asked for, $50,000.'"); *Megge*, at 124 (it is proper to argue that the jury's verdict for plaintiffs would prevent similar negligence in the future); *Phillips v Mazda Motor Mfg*, 204 Mich App 401, 413; 516 NW2d 502 (1994) ("Golden Rule" argument is not reversible error in the absence of an objection at trial); *Kubicz v Cadillac Gage*, 236 Mich App 629, 642; 601 NW2d 160 (1999) ("voice of the community" comment is not reversible error).

This is especially so in the context of the case. The evidence and litigation position made

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[24](...continued)
as steeped in anti-German or anti-Nazi bias. The events in question occurred primarily before the Daimler-Chrysler merger. Although evidence was admitted that the new entity had offices in Germany, the mere mention of ethnic origin does not warrant a new trial. *Bahoda, supra*. Plaintiff's counsel **never** argued, or implied, that Defendant was a "Nazi"; that is a fiction of Appellant's own creation. At most, counsel referred to Ms. Gilbert's perseverance as heroic, a permissible contention. As defense counsel's silence at trial suggests, and as the Court of Appeals reflected, the comments, fairly construed, did not accuse Defendant of being a Nazi organization.

[25]The Supreme Court itself has recognized that the prospect of civil accountability serves the salutary purpose of deterring improper conduct. *Tulkku v Macworth Rees*, 406 Mich 615, 621; 281 NW2d 291 (1979); *Funk v General Motors*, 392 Mich 91, 104; 220 NW2d 641 (1974). The US Chamber itself urges that the purpose of civil rights statutes is to prevent harm (Brief, p. 14).

it clear that Chrysler would not respond to Plaintiff's plight, despite her statements to supervisors and what she revealed by filing suit and in her deposition testimony. That course of conduct provoked[26] the observation that nothing short of a jury's pronouncement could possibly convince Defendant that the conditions of its workplace were unlawful.

The trial court's post-trial ruling is consistent with the approach of Defendant's own trial counsel, who found only one comment objectionable. The fact that defense counsel, who was "on the scene", taking in the trial dynamics, realized that her successful objection served its purpose, bespeaks the absence of prejudice[27] far more eloquently than any after-trial argument by an unsuccessful suitor.

At most, this is a case in which any technical transgression, if it occurred, was cured by judicial instruction. Accordingly, the trial judge did not abuse his discretion in denying the motion for new trial. *Hunt v CHAD Enterprises*, 183 Mich App 59, 65; 454 NW2d 188 (1990); *Barnes v B & V Construction, Inc*, 137 Mich App 595, 601; 357 NW2d 894 (1984); *Argenta v Shahan*, 135 Mich App 477, 482-483; 354 NW2d 371 (1984); *May v Parke, Davis & Co*, 142 Mich App 404, 422-423; 370 NW2d 371 (1985); *Lincoln v Gupta*, 142 Mich App 615, 623-624; 370 NW2d 312 (1985); *Kirk, supra*; *Heins v Detroit Osteopathic Hospital*, 150 Mich App 641, 644; 389 NW2d 141 (1986).

The court's instruction made it clear to the jury that damages were to be awarded for compensatory purposes, not to punish. Plaintiff's counsel himself stressed that very point to the

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[26]Arguments which would otherwise be improper are permissible if provoked by the other side. *Bishop v St. John Hospital*, 140 Mich App 720, 726; 364 NW2d 290 (1984); *Wheeler*, 161 Mich App at 765; *Stephens v Spiwak*, 61 Mich App 647, 651; 233 NW2d 124 (1975).

[27]The fact that the verdict was not returned until **four days** after closing argument fully refutes any suggestion that the jurors reached a knee-jerk decision under the influence of a state of emotional frenzy.

jury. The court's curative instruction in response to Defendant's objection stressed the point again. The trial court did not abuse his discretion in rejecting Defendant's speculation that the jury ignored and awarded punitive damages which Plaintiff foreswore, and which the verdict form did not allow.

B. THE TRIAL COURT DID NOT ABUSE HIS DISCRETION IN EVIDENTIARY RULINGS.

Defendant faults the trial judge for evidentiary rulings regarding two treaters, Mr. Hnat and Ms. Katz, and an unlisted witness which Defendant sought to present. These routine rulings do not constitute an abuse of discretion.

(1) There Was No Reversible Error Created By The Testimony Of Mr. Hnat.

Plaintiff presented as a witness Steven Hnat, a psychiatric social worker (Tr. 6/23, a.m., p. 74). He was licensed to provide therapy, primarily to people with substance abuse, depressive or emotional disorders (*Id*, pp. 75, 81). He has practiced through Northwest Guidance Clinic and Henry Ford Hospital (*Id*, p. 81). Mr. Hnat had been practicing continuously since 1981(*Id*, pp. 82-83), and his expertise in the field of chemical dependency was unchallenged (*Id*, pp. 83-105). He was an adjunct professor at University of Detroit Mercy who taught in the addiction studies curriculum (*Id*, p. 104).

Mr. Hnat began to treat Linda Gilbert in 1992 (*Id*, p. 108). She was referred to him by a doctor at the North Pointe facility (*Id*, p. 109). He treated Plaintiff in the years 1992 and 1993 (*Id*, p. 112). He determined that she was suffering from alcoholism (*Id*, pp. 124-130), which is a fatal disease if not arrested (*Id*, pp. 130-132). Nonetheless, she was functioning well and had the ability to prosper (*Id*, p. 135).

At trial, Plaintiff offered the records of Sacred Heart Rehabilitation Center (Tr. 6/23, p.m.,

p. 18; 603a). Defendant objected to the introduction of the exhibit during the testimony of Mr. Hnat on the basis that, "The foundation hasn't been laid for the introduction of those records, certainly nor pursuant to this individual" (*Id*). She urged that while Mr. Hnat could testify about his own records, he could not testify about records of others institutions (*Id*, p. 20; 605a). The trial court admitted the record and ruled, "I am not really sure that the nature of the questions he will be asked but for sure, he can give his opinion testimony and base that opinion testimony on records are in evidence" (*Id*, p. 20; 605a).

Without objection, Mr. Hnat testified about the physiology and relapse risks of substance abuse (Tr. 6/23 p.m., pp. 4-5), and the affect of stresses like job harassment on alcoholics generally (*Id*, pp. 6-8), and on someone with Plaintiff's background in particular (*Id*, pp. 8-11). He discussed her special vulnerability due to past sexual abuse (*Id*, pp. 12-13). After reviewing the history of Ms. Gilbert's struggles with alcoholism and sobriety (*Id*, pp. 22-31, 36-38), he described the process by which chronic job-related harassment and related stress can literally result in death due to alcoholism and depression (*Id*, pp. 31-32). He related the assessments of other treaters found in the medical records (*Id*, pp. 33-34) and explained the adverse effect of the harassment on her health and survival (*Id*, pp. 38-66).

Defense counsel cross-examined the witness for three days, **herself** eliciting Mr. Hnat's testimony that Ms. Gilbert was referred to him by a psychiatrist who participated in treatment plan reviews (Tr. 6/28 p.m., pp. 26-27). Defense counsel herself questioned Mr. Hnat on the basis of medical records from treatment facilities (Tr. 6/29 a.m., pp. 65-68; Tr. 6/29 p.m., pp. 21-27, 32, 40, 42-43, 52-62, 67-69). Defense counsel elicited the opinion that job-place harassment was the principal factor in her relapses (Tr. 6/30 a.m., pp. 50-52).

Defendant complained generally after trial about the expert testimony of Mr. Hnat regarding

Plaintiff's condition or prognosis. The trial judge found Defendant's arguments lacking in merit (Circ.Ct.Op., pp. 17-22; 24a - 29a). So did the Court of Appeals (Opinion, pp. 32-34; 89a - 91a).

(a) Defendant's General Complaints About Mr. Hnat's Qualifications To Give Expert Testimony Are Not Preserved For Appellate Review.

Defendant and Amici seek to litigate abstract issues regarding the "gatekeeper" role of a trial judge in the MRE 702 evidentiary context [Michigan Chamber Brief, pp. 12-23; MML Liability Brief, pp. 14-19; Daimler Chrysler Brief, pp. 55-63]. That issue was never presented at trial. It was never decided by the trial judge. Defendant never invoked Rule 702. It never sought a "*Daubert*" hearing or anything of the like. Plaintiff was never called upon to provide a more detailed predicate for the admission of testimony. Defendant's objection to the foundation for **medical records** (603a-605a) does not come close to presenting or preserving the Rule 702 Defendant now seeks to present.

The controlling preservation standards are not open to serious dispute. In the absence of a contemporaneous objection at trial, Defendant has preserved no evidentiary issue for appellate review. *Kocks v Collins*, 330 Mich 423, 428; 47 NW2d 676 (1951); MRE 103(a)(1); *Reetz v Rigg*, 367 Mich 35, 41; 116 NW2d 323 (1962).

In fact, many of the "opinions" of which Defendant now complains were elicited by Defendant's **own** attorney in cross-examination. A party will not be heard to complain on appeal of evidence that it offered. See *Capparet v Emmco Ins Co*, 304 Mich 130, 135; 7 NW2d 244 (1943); *Devo v Detroit Creamery Co*, 257 Mich 77, 82; 241 NW 244 (1932); *State Highway Commissioner v Hessell*, 5 Mich App 559, 565; 147 NW2d 464 (1976) ("The appellant will not be heard to claim that its own evidence was incompetent"); *Schweim v Johnson*, 10 Mich App 81, 85;

158 NW2d 637 (1968).

In a related vein, where evidence is admitted without objection, the admission of other evidence of the same type must be deemed harmless. *Yager v Yager*, 313 Mich 300, 308; 21 NW2d 138 (1946); *Tucker v Sandlin*, 126 Mich App 701, 709; 337 NW2d 637 (1983); *Dimmitt & Owens v Realtek*, 90 Mich App 429, 435; 280 NW2d 827 (1979).

(b) Even If Defendant Had Objected To Mr. Hnat's Ability To Offer Opinion Testimony, The Trial Court Would Not Have Abused His Discretion.

Defendant did not seek to establish "new" "Rule 702" law. Even if it had interposed an objection to Mr. Hnat's general ability to offer opinion testimony, there would be no abuse of discretion.

It is for the trial court's evidentiary discretion to determine whether a witness has the expertise necessary to offer opinion testimony under MRE 702. *Mulholland v DEC International*, 432 Mich 395, 402; 443 NW2d 340 (1989); *People v Whitfield*, 425 Mich 116, 122-124; 388 NW2d 206 (1986); *Swanek v Hutzel Hospital*, 115 Mich App 254, 257-258; 320 NW2d 234 (1982).

The fact that Mr. Hnat's formal degree was an MSW does not, by itself, prohibit opinion testimony. *Grow v W.A. Thomas Co*, 236 Mich App 696, 713-714; 601 NW2d 426 (1999) (clinician with MSW degree is qualified to describe patient's condition of post traumatic stress disorder).

The record reveals that Mr. Hnat had an extensive background which enabled him to speak on the subject of substance abuse, complicating factors, and difficulties in maintaining sobriety. He had worked in this field for years, taught the subject at the college level, lectured extensively (see also 129b - 151b), and worked with a psychiatrist who referred Ms. Gilbert to him. If Defendant

had objected to Mr. Hnat's qualifications to offer opinion testimony, the trial court would not have abused his discretion in overruling such an objection.

And, the trial court committed no abuse in overruling the objection that **was** made: that Mr. Hnat could not reveal content of medical records from a hospital at which he did not work. Even if the witness had not been versed in clinical depression, as an expert witness, he would have been allowed to relate, as he did, the findings of other professionals noted in his patient's records. *People v Dobben*, 440 Mich 679, 695-696; 488 NW2d 726 (1992) ("An expert witness may also base his opinion on . . . the findings and opinions of other experts"); *Alexander v Covel Mfg Co*, 336 Mich 140, 145-146; 57 NW2d 324 (1953) (doctor's opinion may be based on a report of another doctor); *Triple E v Mastronardi*, 209 Mich App 165, 175; 530 NW2d 772 (1995) (same as *Dobben*); *Thomas v McPherson Center*, 155 Mich App 700, 709; 400 NW2d 629 (1986); *Swanek, supra*, 115 Mich App at 259-260.

(c) The Trial Court Did Not Abuse Its Discretion In Rejecting Defendant's Post-Trial Attack On Mr. Hnat.

Mr. Hnat had been identified as an expert witness long before trial, but Defendant chose not to depose him. Even so, Plaintiff's counsel and Mr. Hnat voluntarily revealed their friendship. Defense counsel cross-examined Mr. Hnat for three days, and eventually aspersed the witness as biased on the basis of his relationship to Plaintiff's counsel (Tr. 7/15, 123-123).

At trial, Mr. Hnat testified that he did not complete his Ph.D. work, "I stopped when I got my Master's Degree in Psycho-Biology" (Tr. 6/23 a.m., 79; 590a). Defense counsel elected not to cross-examine the witness on this point. In actuality, the witness mis-spoke. He had achieved a Bachelor's degree with high honors in Psychology in 1979 (125b) and a Master's Degree in Social Work in 1982 (127b). He had conducted additional work, and by 1985 had completed all of the

course work necessary for doctorate degrees from the departments of psychology and social work (119b). Although entitled to a Master's Degree from the Department of Psychology, at which he concentrated in psychobiology, the application paperwork had not been submitted (119b - 120b). Thus, while Mr. Hnat was **entitled** to a Master's degree in psychobiology, the degree itself had not been issued.

Seizing on these facts for the first time after the verdict, Chrysler's new counsel sought a new trial. Neither the trial judge (2a - 15a) nor the Court of Appals (84a - 87a) was impressed. Even through the Court of Appeals found no evidence of collusion (87a), Chrysler (Brief, 12, 18, 54-62) and the Michigan Chamber (Brief, 14-16, 21-24) recklessly level accusations of fraud.

There is no suggestion that Mr. Fieger or Mr. Hnat affirmatively said anything untrue about their relationship. Although not required to do so, they voluntarily disclosed it. Defendant made use of the disclosure at trial and its counsel chose to go no further.

In any event, the essential fact of the relationship **was** disclosed to the jury, **was** part of the litigation, and **was** part of the defense counsel's argument to the jury. Any "new trial" pleas ring hollow in light of the fact that the purportedly undisclosed issue **was** part of what was tried. *Tuinstra v Lynemis*, 340 Mich 534, 540; 66 NW2d 252 (1954); *Banner v Banner*, 45 Mich App 148, 154; 205 NW2d 234 (1973). As noted in *Bassett v Trinity Building Co*, 254 Mich 207, 211; 236 NW 237 (1931):

> "A court will not set aside a judgment because it was founded on a fraudulent instrument, perjured evidence, or for any matter if these questions were actually presented or considered in the case which resulted in the judgment assailed. *United States v Throckmorton*, 98 U.S. 61."

Moreover, the **duration** of the Fieger/Hnat relationship was of no real significance, it was the **existence** of that relationship **at the time of trial** which was arguably relevant and unmistak-

ably disclosed. There is no suggestion that their friendship effected **Hnat's treatment of Plaintiff when that occurred.** Rather, it was the existence of a relationship **at the time of trial** which might arguably affect his **trial testimony**.

The lower courts properly concluded that what truly mattered - - the existence of the friendship at the time of trial - - was fully disclosed and considered. Especially so in light of Defendant's utter inability to identify and present any witness who disagreed with the substance of Mr. Hnat's testimony. There was no abuse of discretion in denial of the motion for new trial.

Nor could Defendant claim a new trial under the "newly discovered evidence" mantra. That ground for relief is available "only if the newly discovered evidence 'could not with reasonably diligence have been discovered and produced at trial'". *Stallworth v Hazel*, 167 Mich App 345, 353; 421 NW2d 685 (1988).

Defendant is not the first litigant to seek a new trial by claiming that something said at the first trial was untrue. Understandably, the Courts of this State will not allow a party to complain post-trial of adverse testimony that could have been challenged at trial. See *e.g., Gray v Barton*, 62 Mich 186, 196-197; 28 NW 813 (1886); *Iron Mining Co v Husby*, 72 Mich 61, 63-64; 40 NW 168 (1888); *Columbia Casualty Co v Klettke*, 259 Mich 564, 565-566; 244 NW2d 164 (1982); *Stallworth, supra; Steele v Culver*, 157 Mich 344, 348-349; 122 NW 95 (1909); *Becker v Welch*, 206 Mich 613, 616-618; 173 NW 36 (1919); *Smith v Pontiac Citizens Loan & Investment Co*, 294 Mich 312, 315; 293 NW2d 661 (1940); *Fawcett v Atherton*, 362, 364-367; 299 NW 108 (1941).

The error in Mr. Hnat's testimony was minor. And, it was insignificant. Regardless of whether the "sheepskin" had been issued, Mr. Hnat had completed the work necessary to obtain a Master's Degree in psychobiology and was qualified to offer opinion testimony.

(2) The Trial Court Did Not Abuse Its Discretion By Allowing The Fact Testimony Of Ms. Katz.

Plaintiff also received treatment from Ms. Katz. In the Joint and Final Pretrial Order (108a), Plaintiff identified "Psychiatrists of Linda Gilbert" and "Treating Physicians" as expert trial witnesses. Nonetheless, the trial court sustained Defendant's objection to any expert testimony from Ms. Katz. The court did, however, allow her to testify as a fact witness (Tr. 6/29 a.m., 104). She did so without further objection.

Defendant criticized this ruling on appeal, citing no authority in support of its argument. The Court of Appeals found the argument meritless (Opinion, p. 34):

> "[Defendant] has failed to develop its argument to differentiate between Hnat as an expert and Katz as a fact witness. Accordingly, having failed to present an argument or cite any authority that the trial court erred in allowing Katz to testify to the facts surrounding her treatment of Gilbert, Chrysler has abandoned this portion of its argument. Furthermore, to the extent that Katz may have rendered opinions as if she were an expert, Armstrong did not object to any part of her testimony on that basis and actually asked Katz questions that required Katz to render an opinion. A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." (footnotes omitted).

There is no occasion to fault the Court of Appeals decision. A party which cites no supporting authority has preserved no issue for review. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Patterson v Allegan County Sheriff*, 199 Mich App 638, 640; 502 NW2d 368 (1998); *Mann v Mann*, 190 Mich App 526, 563-537; 476 NW2d 439 (1991). Defendant offers no basis for challenging the continued vitality of this rule.

Nor does it present any challenge to the ordinary rule requiring an objection at trial to preserve an evidentiary issue for appellate review. MRE 103(a)(1); *Kocks, supra; Reetz, supra.*

Even its unpreserved substantive argument provides no basis for reversal. Whether to allow a belatedly identified witness is a matter of discretion. *Banks v Wittenberg*, 82 Mich App 274, 277; 266 NW2d 788 (1978); *Birou v Thompson-Brown Co*, 67 Mich App 502, 510; 241 NW2d 265 (1976); *Jamison v Lloyd*, 51 Mich App 570, 574-571; 215 NW2d 763 (1974).

Several factors favor the trial court's exercise of discretion. The trial judge ruled that Ms. Katz could **not** testify as an expert witness, only as a fact witness (Tr. 6/26 a.m., p. 104). He did grant substantial relief to Defendant while permitting the jury to be apprised of the facts known to her. Some judges might have granted more relief to Defendant (excluding the witness entirely), others might have granted less (allowing both fact and expert testimony from her). That is the essence of discretion. *People v Stephens*, 58 Mich App 701, 706; 228 NW2d 527 (1975).

Moreover, Defendant could not credibly claim to be surprised. Ms. Katz was a social worker who treated Plaintiff, and the nature and course of treatment were documented in the records (Tr. 6/29 a.m., 89-91).[28]

The limitation to fact testimony further assisted Defendant. As the witness was not allowed to serve as an expert, there was no need to search for extraneous impeachment materials, for example scholarly writings, see MRE 707. The trial court's ruling is consistent with the recognition that tardy identification of fact witnesses is generally not prejudicial, while belated identifications of experts *is*.

Additionally, Defendant was advised that Ms. Katz would be called a week before she actually testified. Defendant made no claim at trial, and makes no claim now, that this was inadequate preparation time.

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[28]The records serve both to provide Defendant with notice of her involvement and documentary impeachment materials if the witness testified differently than what the records reflect, a further protection against prejudice to Defendant. See *e.g.* Tr. 7/6 a.m., 119).

Defendant also apparently suggests that even though the trial judge's ruling was appropriate, the testimony in fact crossed the line into the field of expert testimony. However, with one minor exception,[29] Defendant voiced no such objection at trial. Its post verdict claim of evidentiary error is not preserved for review on the merits.[30] MRE 103(a)(1); *Reetz, supra.*

(3) The Trial Court Did Not Abuse His Discretion In Declining To Permit Defendant To Ambush Plaintiff With An Unlisted Psychiatric Witness.

The trial court allowed Defendant to present any listed witness it chose. Apparently **none** of the listed witnesses would smear Plaintiff, so Defendant presented no damage witnesses at trial. Instead, just before closing argument was about to begin, it noted its complaint that it was not allowed to call a surprise, unlisted psychiatric expert (Tr. 7/15, 15-16).[31] It now complains that the trial court did not permit it to perpetrate this ploy. The Court of Appeals found this argument unpersuasive (Opinion, 35-36).

The exclusion of unlisted experts is expressly authorized by MCR 2.401 (1)(2). Whether to allow a belatedly identified expert is a matter of discretion, and there is no abuse of

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[29]Defendant did object to a single answer - - that another therapist also recognized that Plaintiff's problems revolved around workplace harassment - - claiming that this did not pertain to Ms. Katz's own treatment of Plaintiff (Tr. 7/6 a.m., 71). This objection was overruled after Plaintiff laid a further foundation establishing that part of the treatment by Ms. Katz was to learn the assessment of other professionals (*Id*, pp. 72-75).

[30]The line between fact testimony from a professional, and expert testimony, may sometimes be hazy. Here, even if there had been an objection, the trial court would not have abused his discretion in concluding that the testimony of Ms. Katz was factual in nature.

[31]At that juncture, Defendant offered no on-the-record argument in support of its desire to call a surprise witness. Without any showing of the substantive argument made in support of allowing the witness, Defendant has shown no preserved issue at all. How is this Court expected to fault the trial court's exercise of discretion without knowing what Defendant did or said to invoke that discretion?

discretion in disallowing a non-disclosed expert. *Carmack v MCCC*, 199 Mich App 544, 546; 502 NW2d 746 (1993); *Herrera v Levine*, 176 Mich App 350, 356; 439 NW2d 378 (1989); *Holdsworth v Nash Mfg*, 161 Mich App 139, 144; 409 NW2d 764 (1987); *Pollum v Borman's Inc.,* 149 Mich App 57, 61-62; 385 NW2d 724.

It is also settled that no issue is preserved for appeal absent an offer of proof. MRE 103(a)(2); *People v Wakeford*, 418 Mich 95, 117; 341 NW2d 68 (1983); *Bujalski v Metzler Motor Sales Co*, 353 Mich 493, 498-499; 92 NW2d 60 (1958). Defendant made no offer of proof of the substantive evidence it sought to present. It has preserved no issue for appellate review on the merits.

Additionally, there are ample grounds for sharing the trial court's belief (Circ. Ct. Op., p. 22, fn. 7) that Defendant is less than candid in claiming that it was clueless before Mr. Hnat's testimony that there was any reason to call a psychiatric expert. The Complaint, filed more than **5 years** before, claimed that the sexual harassment caused mental anguish. The medical records mentioned Plaintiff's condition, including the sequelae of the harassment and alcoholism. When Mr. Hnat testified, Defendant made no claim that it was unfairly surprised by his testimony. In fact, long before trial, Defendant had obtained an independent psychological examination of Plaintiff (Tr. 6/15, pp. 20-31). The contention that Defendant had no reason to anticipate until mid-trial that Plaintiff's mental condition was in issue rings hollow.

Moreover, the testimony of which Defendant complains began on June 23rd. If that were truly the impetus for presenting a defense psychiatric expert, Defendant could have disclosed its intent to call an unlisted witness **at that time**. If it had done so, while there were still three weeks left of the trial, perhaps the trial court's ruling would have been different. Instead, Defendant

waited until the very end of the trial, when Plaintiff could no longer prepare for the testimony,[32] before seeking to present the undisclosed witness. In view of that gamesmanship, the trial judge properly exercised his discretion in avoiding trial by ambush.

Defendant received a fair trial. The adverse verdict reflects the jury's dispassionate assessment of conduct by Defendant which was simply intolerable, indefensible, and illegal. The efforts of Daimler Chrysler to blame others must fail. It maintained a workplace that was a cesspool of sexual vulgarity, verbal abuse, mental abuse, sexually explicit magazines and "cartoons" intended to harass, offend, and drive women from the plant. It has no one but itself to blame for being held accountable for creating and maintaining that cesspool.

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[32]The allowance of undisclosed witnesses is usually predicated on the ability of the other side to prepare significantly in advance of the testimony. See *e.g. Snyder v NYC Transport Co*, 4 Mich 38, 44-45; 143 NW2d 791(1966) (where the witness was identified in "sufficient time so that plaintiff could have prepared to meet his testimony"); *Carr v Detroit*, 48 Mich App 150, 152; 210 NW2d 143 (1973) (where "the court granted defendant a continuance and allowed defendant to depose [the expert]"); *Jamison v Lloyd*, 51 Mich App 570, 574; 215 NW2d 763 (1974) (where "the trial court afforded defense counsel ample opportunity to question the witness before the witness was called").

The need for pre-testimony discovery of expert witnesses is evident from the common-place use of expert witness interrogatories and "discovery only" depositions, MCR 2.302(C) (7). See *Roe v Cherry-Burrell Corp*, 28 Mich App 42, 47-49, 52; 184 NW2d 350 (1970); *Kernen v Rendziperis*, 62 Mich App 359, 361-363; 233 NW2d 281 (1975) and *Kissel v Nelson Parking Co*, 87 Mich App 1, 5; 273 NW2d 102 (1978).

Whatever latitude might be allowed for peripheral witnesses, *Pollum,* 149 Mich App at 62-63 makes clear the rightful recognition that trial by ambush on a decisive expert issue will not be allowed. Particularly so here, where Plaintiff had issued expert interrogatories which Defendant never answered (Tr. 6/15, 27-28).

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL JUDGE COMMITTED NO ABUSE OF DISCRETION IN DENYING DEFENDANT'S MOTION FOR REMITTITUR.

At trial, Plaintiff sought damages of $140,000,000 (Tr. 7/15, 96-99). Instead, the jury assessed damages at $21,000,000 (Tr. 7/19, 3-5).

Defendant filed the predictable motion for new trial or remittitur. The trial court discussed Defendant's arguments and, finding them wanting, denied the motion (Circ.Ct.Op., 45-50; 52a - 57a).

On appeal, Chrysler's damage argument was essentially a 2½ page afterthought (Brief, 72-74). It raised no argument under the United States Constitution.

The Court of Appeals fully considered Chrysler's complaint about the compensatory award (Opinion, 37-38; 94a - 95a). It found no abuse of discretion.

Defendant and Amici ask this Court to substitute its quantification of non-economic damages for that of the jury, to overturn the trial court's denial of the remittitur motion, and to reverse the appellate court's holding that there was no abuse of discretion. They are unable to cite a **single** Michigan appellate ruling that has reversed a trial court's denial of remittitur[33] on the ground that the court disagreed with the quantification of non-economic damages.[34]

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[33]In most of the cases cited, this Court has deferred to the trial court's discretion. See *e.g. Palenkas v Beaumont Hospital*, 432 Mich 527; 443 NW2d 354(1989); *Bosak v Hutchinson*, 422 Mich 712; 375 NW2d 333 (1985). Where it has reversed, it has reversed the trial court's **grant** of remittitur, ordinarily on the ground that remittitur impermissibly compromises the constitutional role of the jury.

[34]In *McDonald v Champion Iron & Steel Co*, 140 Mich 401, 413; 103 NW 829 (1905), this Court reversed denial of a remittitur ruling because there was "no evidence on which to base [the jury's verdict]". Here, there is ample evidence that Plaintiff suffered compensable non-economic (continued...)

To justify this unprecedented benefit, Defendant relies on the **federal** statute limiting Title VII damages (Brief, 66). Chrysler and Amici urge this Court to impose a judicial damage cap, limiting Plaintiff's recovery to verdicts by different juries, to different plaintiffs, for different forms of sexual harassment, over different periods of time, having different consequences. This Court should adhere to the rule of law and decline to serve as a Defendant-favorable damage-finder.

A. NO ISSUE REGARDING PUNITIVE DAMAGES IS PRESENTED OR PRESERVED FOR SUPREME COURT REVIEW.

Apparently believing that a myth repeated often enough takes on the illusion of truth, Defendant seeks to characterize the verdict as including unconstitutional punitive damages. In reality, the jury was not asked to, and did not, assess punitive damages.

At trial, it was defense counsel, in the sole objection to Plaintiff's closing argument, who tried to inject the issue of punitive damages into the case (Tr. 7/15, 98). That was not the claim of Plaintiff, whose counsel made her position clear, "You may not punish, you may not harm, you may simply compensate Linda for what she has suffered" (Tr. 7/15, 97).

Nor was the jury allowed to consider or award punitive damages. The jury was told directly that its verdict could only compensate, not punish (Tr. 7/15, 25-27). Indeed, the jury verdict form itself listed the compensable elements of recovery and did not permit a punitive damage award. The verdict itself was based solely on those elements and included nothing in the way of punitive damages (Tr. 7/19, 3-4). The assertion that the jury awarded punitive damages finds no support in the record.

It is probably for this reason that Defendant's experienced appellate counsel made no

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[34](...continued)
losses.

semblance of a constitutional argument in the Court of Appeals. Defendant can scarcely fault the Court of Appeals for failing to embrace an argument that Defendant itself did not deem worthy of presentation.

This Court does not sit to entertain arguments which have not been presented to the lower courts. Issues not preserved below, even constitutional issues, are not to be considered on the merits. *Butcher v Dept of Treasury*, 425 Mich 262, 276; 389 NW2d 412 (1986); *Dagenhardt v Special Machine*, 418 Mich 520, 527; 345 NW2d 164 (1984).

B. A REMITTITUR MOTION CHALLENGING NON-ECONOMIC DAMAGES IN A CASE ARISING UNDER THE ELLIOTT-LARSEN CIVIL RIGHTS ACT IS ADDRESSED TO THE DISCRETION OF THE TRIAL COURT AND LOOKS TO THE EVIDENCE; THE COURT SHOULD REJECT THE INVITATION TO JUDICIALLY CREATE DAMAGE LIMITATIONS THAT THE LEGISLATURE DID NOT IMPOSE IN THE ELLIOTT-LARSEN ACT.

This case arises under the Elliott-Larsen Act. In contrast to Title VII of the Civil Rights Act of 1964 [42 USC § 1981(b)(3)(D)] and state common law actions for medical malpractice [MCLA 600.148] or product liability [MCLA 600.2946a], the Legislature did **not** limit the recovery of persons whose civil rights have been violated. The Act makes a jury the fact-finder. *Schafke v Chrysler Corp*, 147 Mich App 751, 753; 383 NW2d 141 (1985); *King v General Motors Corp*, 136 Mich App 301, 308-309; 356 NW2d 626 (1985). The statutory recovery is not artificially limited. See MCLA 37.2801:

> "(1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both.
>
> * * *
>
> (3) As used in subsection (1), 'damages' means damages for

injury or loss caused by each violation of this act, including reasonable attorney's fees."

(1) The Court of Appeals Applied The Appropriate and Settled Legal Standards.

a. **The Standard of MCR 2.116 (E) Looks To The Particular Evidence of A Particular Case.**

Defendant advocates the judicial creation of a *de facto* damage cap that limits an Elliott-Larsen recovery to verdicts in other cases that bear some vague resemblance to a given case. That approach would ignore the specific language of MCR 2.611(E) and the case law which focuses attention on the facts.

Defendant places heavy reliance on *Palenkas*, a case involving a common law cause of action, for which there was no statutory damage entitlement, where this Court **affirmed** the trial court's exercise of discretion in deciding a remittitur motion, and there **were** "comparable" cases reported in Michigan. Chrysler is in error when it posits that *Palenkas* requires **reversing** a trial court's exercise of discretion, in a **statutory** cause of action, involving a **legislative** damage enactment, because it is higher than other verdicts, in cases which are **not** truly "comparable".

Even in the distinguishable *Palenkas* context, this Court did not adopt a damage limitation by which the highest reported "similar" case is the artificial ceiling. The logical import of that approach is that the first reported decision becomes the *de facto* damage limit, since any higher verdict necessarily "exceeds" that so-called "standard". *Palenkas* made no such declaration. To the contrary, it stressed the deference due the trial court (432 Mich at 531, 533, 534, 537). So called "comparable" cases were noted, but only in finding no abuse of discretion.

Indeed, the Court in *Palenkas* cited the express language of MCR 2.611 (E)(1), setting forth the explicit standard, the "highest . . . amount the evidence will support" (432 Mich at 531), noting

that this is "[t]he only consideration expressly authorized" (432 Mich at 532). The lower courts correctly adhered to the explicit standard of the Court Rule rather than embracing the "highest earlier opinion" approach advocated by Defendant.

Court rules are to be construed by the same principles applied to the construction of statutes. *O'Neill v Home IV Care, Inc*, 249 Mich App 606, 616-617; 643 NW2d 600 (2002); *In re PAP*, 247 Mich App 148, 154; 640 NW2d 880 (2001). The judiciary is not to substitute its own view of policy for the language used. *Karl v Bryant Air Conditioning*, 416 Mich 558, 567; 331 NW2d 456 (1982); *Dussia v Monroe County Employees Retirement System*, 386 Mich 244; 191 NW2d 307 (1971).

Under this settled standard of Rule 2.611(E)(1), if the evidence supports the verdict, a remittitur motion be denied. *Scott v Illinois Tool Works*, 217 Mich App 35, 45; 550 NW2d 809 (1996); *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995); *Brewster v Martin Marietta*, 145 Mich App 641, 663-664; 378 NW2d 558 (1985); *Wolff v Automobile Club*, 194 Mich App 6, 17-18; 486 NW2d 75 (1992); *Ritchie v Mich Con (After Remand)*, 176 Mich App 323, 325; 439 NW2d 706 (1989). The lower court faithfully adhered to that principle in looking to the outrageous facts of this case and the impact on Plaintiff.

(b) The Damage Facts Are To Be Viewed Favorably To The Non-Movant.

The assessment of damages in a personal injury action is a question of fact. *Precopio v Detroit*, 415 Mich 457, 465-467; 330 NW2d 802 (1982); *Lawrence v Tippens*, 53 Mich App 461; 219 NW2d 787 (1974). Under Michigan's Constitution [Art. I, § 14], the right to trial by jury extends to the determination of damages. *Leary v Fisher*, 248 Mich 574, 578; 227 NW 767 (1929); *Mink v Masters*, 204 Mich App 242, 247; 514 NW2d 235 (1994); *Equico Lessors, Inc v*

Original Buscemi's, Inc, 140 Mich App 532, 536; 364 NW2d 373 (1985); *Waisanen v Gaspardo*, 30 Mich App 292, 293-294; 186 NW2d 75 (1971).

It is the function of the jury, not the court, to find the facts upon which a damage assessment must rest. It is the function of the jury to determine what damage evidence to believe, and what inferences are to be drawn from those facts. Just as a trial judge may not vacate a jury's liability finding because he would have ruled otherwise, neither can a judge overturn a damage finding because of disagreement with the result. In this context, as confirmed by the "highest . . . amount the evidence will support" standard, the damage facts must be viewed in a light favorable to the non-movant. A court may not substitute its judgment on damages facts for that of the jury, *Palenkas,* 432 Mich at 538.

In large part, Defendant's argument is founded in the untenable premise that the jury was legally impelled to accept its dismissive attitude about the effect of the unrelenting mental torture to which Plaintiff was subjected. Contrary to Defendant's suggestion, the jury was entitled to decide damage facts favorable to Plaintiff.

(c) It Is For the Jury To Equate Non-Economic Losses With Money.

These principles are of special importance when the verdict is for non-economic losses. The wrongdoer's conduct has inflicted a loss of fundamental human dignity that has no objective monetary equivalent. There is no hypothetical "market-place price" for the "right" to mistreat women. There is no set equation of money and misery. M Civ JI 45.02 instructs the jury on this proposition, "The amount of money to be awarded for certain of these elements of damages

cannot be proven in a precise dollar amount. The law leaves such amount to your sound judgment."

The cases have confirmed that the quantification of non-economic damages is a matter for the jury whose verdict will not be lightly disturbed. *Watrous v Conor*, 266 Mich 397, 401; 254 NW 143 (1943); *Stevens v Edward C Levy Co*, 376 Mich 1, 5; 135 NW2d 414 (1965). In *Kirk v Ford Motor Co*, 147 Mich App 337, 346-347; 383 NW2d 193 (1985), the Court of Appeals noted:

> "Just as no marketplace formula exists to mathematically calculate pain and suffering, no precise formula exists for the loss of society and companionship. Those determinations are for the jury, and a reviewing court will not arbitrarily substitute its judgment for that of the fact-finder. *Brown v Arnold*, 303 Mich 616, 627; 6 NW2d 914, 918 (1942). Furthermore, placing a monetary value on human life is at best a nebulous decision-making process which does not lend itself to an exacting type of review."

The assessment of non-economic damages necessarily involves a value judgment which our Constitution places in the hands of the jury. In the most basic terms, the jury must attempt to place a monetary equivalent on inherently human losses, like the destruction of human dignity, the loss of mental well-being degradation, the loss of personal security, the loss of freedom, and the lost quality of life itself. The equation depends on the relative values placed on human rights and on money. Defendant's argument diminishes the value of human civil rights and exalts the value of the dollar bill. A jury may permissibly regard dollars as far less valuable than dignity. Unlike the value system Defendant asks this Court to impose by fiat, the jurors employed a different value system; one which regards the loss of dignity and mental well-being as a loss of tremendous gravity which requires a large number of dollars to serve as the equivalent.

(d) The Trial Court's Ruling Is Reviewed For Abuse of Discretion.

A remittitur motion is addressed to the discretion of the trial court, who was "on the scene" and better able than a reviewing court to assess the "drama of the trial", *Palenkas*, 432 Mich at 534. An appellate court can interfere with the trial court's decision only upon finding an abuse of discretion, *Palenkas*, 432 Mich at 533-534; *Hines v Grand Trunk W R Co*, 151 Mich App 585; 391 NW2d 750 (1985); *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785; 396 NW2d 223 (1985); *Phillips v Mazda Motor Mfg*, 204 Mich App 401, 416-417; 516 NW2d 502 (1994); *Byrne v Schneider's Iron, Inc*, 190 Mich App 176, 183-184; 475 NW2d 854 (1991); *Klinke v Mitsubishi Motors*, 219 Mich App 500, 516; 556NW2d 528 (1996), affirmed 458 Mich 582; 581 NW2d 272 (1998).

Substantial deference is in order, since the trial court was uniquely well-situated to gauge the trial dynamics. *Palenkas, supra; Phinney v Perlmutter*, 222 Mich App 513, 538; 564 NW2d 532 (1997); *Howard v Canteen Corp*, 192 Mich App 427; 481 NW2d 718 (1992).

In sum, the Court of Appeals decision applied the well-settled rule of law. This Court should not make up a new set of "rules" to spare Defendant from the consequences of the losses it caused.

(2) The Court Should Not Create A Judicial Damage Limitation.

Defendant calls upon this Court to create some judge-made damage cap, and overturn all that has gone on in the case. That extraordinary step should not be taken.

(a) It Is Fallacious To Substitute Review Of Other Reported Verdicts For Analysis Of The Facts Of This Case

Earlier reported opinions in different cases are an inherently unreliable indication of how

reasonable jurors may respond to the unique facts of a particular case. No other employer has ever tolerated a work environment so perverse, so long-lasting, so unrelenting, and so devastating to the victim. Reported cases necessarily involve lesser or marginal misconduct, with less impact, and therefore a lesser measure of recovery. It is illogical to deny a person who sustained $1,000,000 a year in economic losses full compensation just because other "comparable" reported cases involved annual income losses of $20,000. Likewise, here it is irrational to deny full recovery of non-economic losses, just because those with lesser losses have received lesser recoveries.

The defense approach ignores the phenomenon of settlements, which commonly involve "confidentiality" clauses regarding amount, especially where the amount is significant. In the rare case of egregious working conditions, other employers have the decency and wisdom to resolve their liability. Daimler Chrysler has the rare callousness that it is willing to let the world know how Linda Gilbert was treated in order to withhold redress and require her to undergo public humiliation. It is illogical to permit Defendant to reduce its accountability just because other employers do not castigate the victims of sexual harassment publicly, and therefore keep the amount of settlements out of the limelight.

It is also fallacious to assume that "similar" misconduct by two defendants will have the same impact on two different plaintiffs, from two different background, with two different sensitivities. Particularly where non-economic damages are involved, other cases are no real gauge of a given plaintiff's losses.

For these and other reasons, commentators and courts have disavowed the notion that damages are limited to verdicts in other cases. To be sure, if "comparable" cases really existed, they could be considered by an appellate court as one factor in reviewing a trial court's remittitur ruling, *Palenkas, supra*. However, a "comparison [with other verdicts] cannot serve as an exact indicator", *Palenkas*, 432 Mich at 538.

It is fallacious to assume that a true "comparison" is even possible. The authors of Martin, Dean & Webster, Michigan Court Rules Practice (supp, pp. 112-113) point out:

> "[I]t is highly unlikely that truly 'similar' cases actually exist. The variables influencing the amount of even a single jury verdict are too numerous and complex to say, with any significant degree of reliability or validity, that jury awards in ***two*** cases should be similar. Even if one were to assume, and it is a gross assumption, that two plaintiffs suffered almost identical physical injuries, resulting in almost identical physical disabilities, the following variables still exist even before jury involvement: the degree of pain experienced by each plaintiff, the mental anguish and mental disabilities suffered and retained by each plaintiff, the impact of any remaining physical or mental residuals may have on each plaintiff's future ability to engage in employment and to have a private and social life similar to that he or she enjoyed before the injury, all the while taking into consideration each plaintiff's age, education, and past work experiences at the time of the injury."
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> * * *
>
> ". . .[M]ay one properly compare a jury verdict rendered in 1985 or earlier with one rendered in 1990? If the American economy is subject to wild fluctuations in the prices of stocks, consumer goods, medical care, and the like, which it is, are not adjustments really necessary before accurate comparisons may be made between jury verdicts rendered during periods of recession and those rendered during periods of economic expansions?
>
> The authors therefore suggest that comparison of comparable awards in similar cases is not a valid workable standard ... One of the essential values of trial by jury is that different juries may reach different conclusions. This is one of the very reasons why the right to trial by jury exists, and has been so carefully preserved and guarded. The impulse, however well intended, to review jury awards on a statistical, impersonal, basis should be avoided at all costs."

The instant case underscores the point. Defendant is unable to point to a single case involving harassment of such daily and lengthy duration or such horrifyingly graphic detail. It cites no other case where the torment and psychological torture comes close to that of this case. It cites no other case where the daily abuse incessantly rekindled the haunting memories of the

victim's childhood sexual violation. It finds no "comparable" cases in which the plaintiff's life itself is truly in jeopardy, as here. These are but a few of the multitude of variables which make this case legally and factually unique.

While it purports to contrast this case to other "comparable" ones, Defendant is unable to cite a single one involving the synergistic effect of multiple, literally daily, shocking efforts to oust Ms. Gilbert from the workforce, efforts which have had the intended effect of mentally devastating Plaintiff. Indeed, Defendant has not cited a single case where the jury's assessment of damages, upheld by the trial court and Court of Appeals, has been abolished by a stroke of the Supreme Court pen.

What Defendant proposes - - that this Court usurp to itself the task of assessing non-economic damages, without seeing a single witness, on the basis of the select handful of discrimination cases that result in published opinions - - is truly staggering and unprecedented. The Court should not make itself into damage censors to benefit wrongdoers.

(b) This Court Should Respect The Legislature's Decision Not To Limit Elliott-Larsen Damages.

Defendants and Amici may have successfully lobbied Congress to limit the **federal** remedy, but they have **not** successfully obtained that relief from the Michigan Legislature in Elliott-Larsen actions. The Legislature knows how to enact damage limitations. It has done so in medical malpractice and product liability actions. However the Legislature has **not** artificially limited the recovery of civil rights claimants.[35] This Court should decline to create judicial limitations on

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[35]The absence of a legislative limitation may reflect the belief that civil rights protections, and laws intended to foster equal employment opportunity, are far too important to be watered down by limitations on recovery. The Legislature may have believed that damage limitations would encourage businesses to foster cesspools of discrimination, paying modest damage awards, rather (continued...)

sexual harassment claims which big business has been unable to obtain from the legislative branch of government.

There can be no doubt that the language of MCLA 37.2801 does not create, or invite courts to create, a ceiling on recovery. Regardless of whether one agrees with the abstract merits of that policy judgment, this Court has made clear its commitment to respecting the role of the Legislature, *Donajkowski v Alpena Power Co*, 460 Mich 243, 253; 596 NW2d 574 (1999); *McDougall v Schanz*, 461 Mich 15, 37; 597 NW2d 148 (1999), especially where the statutory language is unambiguous, *Karl v Bryant Air Conditioning*, *supra*. That commitment should be no less firm when the Legislature has not succumbed to employers who seek to limit their accountability.

The contrast between the Elliott-Larsen lack of "caps" and the existence of caps in medical malpractice and product liability suits is a far more striking contrast than the distinction between "a" and "the" in *Robinson v City of Detroit*, 462 Mich 439, 459-462; 613 NW2d 307 (2000). Yet, as *Robinson* and other cases have held, the judiciary must respect the Legislature's choice of different language in different enactments.

In short, the cause of action itself is a creature of the Legislature. The availability of a damage remedy exists by virtue of the statutory language. As the Legislature has decided not to limit recovery, this Court should respect the legislative judgment by declining to impose a judge-made limitation.

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[35](...continued)
than bear the cost of meaningful corrective action. This Court should decline the invitation to judicially intervene in a way that would remove the deterrent to harassment which the Legislature created by permitting an unlimited damage recovery. In all events, it was the province of the Legislature to permit unlimited damages, and this Court's duty is to respect that policy judgment.

(3) The Trial Court Did Not Abuse His Discretion.

At bottom, the Court of Appeals correctly discerned no abuse of discretion by the trial judge. This Court should not disrupt that conclusion.

(a) "The Evidence" Standard.

The correct standard looks to the evidence presented at trial. The facts are spelled out in the Counter-Statement of Facts and Court of Appeals Opinion. While mere words cannot begin to convey the poignancy of Ms. Gilbert's testimony on the depth of her loss, they give some inkling of the potency which the trial judge and jury observed with their own eyes and heard with their own ears.

One measure of damages is the duration of the loss. By the time of trial, Plaintiff had been forced to endure harassment on virtually a daily basis, over seven years of work weeks that sometimes exceeded 80 hours. Judging by the past, she is destined to face more of the same over the 30 more years she may work. The evidence reflects abuse that may span some 1,750 weeks (35 years at 50 weeks per year) or 105,000 work hours (1,750 weeks at 60 hours per week).

Yet that understates the duration of the damage considerably. The psychological terrorism haunted Plaintiff while "off the clock". This strong pioneer woman broke down in tears, sobbing uncontrollably, over 100 times, just in the presence of another Chrysler employee. Her off hours were consumed in the horrific anticipation of what awaited her the next day, a horror she could only partially hide in an alcoholic haze. In truth, the pernicious effects take their toll in off-work waking hours - - another 100,000 hours of so through her work life.

Even this analysis is favorable to Defendant. It overlooks the devastation wrought by the alcohol to which Ms. Gilbert has turned in a desperate attempt to escape the trauma of her daily existence. Sadly, Chrysler may drive her to a tragic, premature, and senseless death.

The jury's award - - $20,000,000 for 200,000 hours of mistreatment - - works out to $100 per hour for all elements. The jury was instructed, without objection, on the multiple elements of compensable damages (Tr. 7/15, 26):

> "The mental anguish, which would include shame, anger, chagrin, or disappointment and worry. Physical pain and suffering. Fright and shock. Denial of social pleasure and enjoyment. Embarrassment, humiliation, or mortification. Outrage. Disability, including the loss or impairment of Plaintiff's psychological well being, the increase in Plaintiff's disease of substance abuse arising from an aggravation of a pre-existing condition. The reasonable expenses of necessary medical care, psychological care, treatment and services, and the loss of wage earning capacity."

When considered on a "per element" basis, the assessment works out to less than $10 per hour for each compensable element of recovery.

The words "terror", "horror", and "abuse" are too mild to describe the intensity of what Linda Gilbert was made to suffer. The verbal degradation was commonplace. Other degradations, although persistent, were intermittent. Consequently, Plaintiff lived in a constant state of terror, never knowing when, or where, the next profane depiction would arise.

The written word cannot come close to conveying the magnitude of the effect on Linda Gilbert. Unlike this Brief, the trial court and jury could look into Ms. Gilbert's eyes and assess her as a person, a witness, and victim. The court and jury could understand Plaintiff's frustration and the agony of having the abuse compounded by an employer that did nothing.

The Court is urged to read the moving damage testimony of Plaintiff, Ms. Katz, Mr. Hnat, and Mr. Lemmerz. It is asked to try to understand the impact of what occurred to a young woman striving to do no more than competently do her job in a male-dominated employment milieu. To do so is to begin to embrace the understanding developed by the jury and trial court after weeks of trial - - the understanding that the size of the verdict is equaled or eclipsed by the

enormity of what Defendant permitted to be inflicted on Linda Gilbert.

(b) Extraneous Standards

Defendant's reliance on verdicts in different cases implies that it is proper to look to matters outside the evidence. That approach is untenable, but even that focus yields the conclusion that there was no abuse of discretion.

To place a price tag on the daily losses Plaintiff suffered from workplace events, one might look at the amounts a business of Defendant's size voluntarily pay others to perform stressful job obligations. German secrecy laws conceal the amounts paid by Daimler Chrysler to executives who have the peace of mind that persons urinating on their chairs will be investigated and disciplined (see Opinion, p. 9). However, payments to other executives who endure lesser job stresses are well-publicized.

Mr. Nasser, the CEO of Ford Motor Company, was reportedly paid $10,000,000 in 2001, a year in which his efforts led to a **5.5 billion dollar loss**. The mental anguish he endured that year pales in comparison to the humiliation Plaintiff was forced to bear for seven years leading up to trial (and, predictably, several more years after).

Mr. Nasser was not overpaid for his grief by modern standards. The CEO of Enron, Kenneth Lay, received a reputed $205,000,000 in stock options and other compensation in the four years preceding his company's bankruptcy. In effect, Plaintiff received, for her lifetime losses, while doing an unassailable job for her employer, a fraction of what companies voluntarily pay executives for the lesser headaches of **their** jobs.

The verdict is also a minuscule sum in the overall Daimler Chrysler picture. According to its stock profile, there are about 1,000,000,000 shares of stock outstanding. The verdict amounts to about a 2¢ a share, a momentary blip in an hour's stock price fluctuation. Published financial reports reveal that Defendant realized net income of $771,000,000 the third quarter of 2002 (down

from $991,000,000 the preceding year), from operating income of $1,700,000,000 that quarter, $4,600,000,000 for the first nine months of the year. The recovery by Plaintiff is a mere fraction of 1% of Defendant's annual operating income, and is modest from that standpoint as well.

Defendant's "other sexual harassment" case analysis is far from honest. Looking only at automobile companies, and ignoring every other case of sexual harassment in any other field of employment in the Country, the largest recovery is a $34,000,000 **settlement** by Mitsubishi in June of 1998 (Detroit Free Press, 10/6/02, p. 12A). Other **settlements** by automobile manufacturers in sexual harassment cases include a $9,000,000 settlement by Ford in November of 2000 (Detroit Free Press, 10/6/02, p. 12A), and $7,500,000 by that company in September of 1999 (*Id*). While Daimler Chrysler may believe that sexual harassment of women is acceptable and insignificant, other automobile manufacturers recognize their responsibilities and the gravity of injury by agreeing to high seven and eight figure settlements to avoid the higher measure of full redress available to a victim like Linda Gilbert who recovers for all losses at trial.

If one looks at the recovery for every minute of emotional devastation, one may compare *Klinke, supra*, where the appellate court upheld a non-economic damage assessment of $100,000 for seconds of conscious pain and suffering. At the *Klinke* rate, the verdict in this case fails to compensate Plaintiff for even one week of terror, for **all** elements of recovery combined. Stated differently, on a per minute basis, the verdict in only a fraction of 1% of that upheld in *Klinke*.

When all is said and done, the verdict, while substantial, is commensurate with the magnitude of the incessant mental abuse and its catastrophic impact on Plaintiff's desire to be able to do her job free from sex-based emotional torture. More to the point, the Court of Appeals decision correctly recognizes the roles of the jury and trial judge in assessing non-economic damages. This Court should not succumb to the political pandering of Defendant and Amici who seek a judge-created shield from the consequences of violating a legislative enactment.

RELIEF SOUGHT

WHEREFORE, Plaintiff prays that this Honorable Court affirm the Judgment of the Circuit Court and the decision of the Court of Appeals.

Respectfully submitted,

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